DOCKET

No. 13-1067

Title:	OBB Personenverkehr AG, Petitioner
	v.
	Carol P. Sachs
Docketed:	March 7, 2014
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(11-15458)
Decision Date:	December 6, 2013

Questions Presented

—Date—	——Proceedings and Orders——————————
Mar 5 2014	Petition for a writ of certiorari filed. (Response due April 7, 2014)
Apr 2 2014	Brief of respondent Carol P. Sachs in opposition filed.
Apr 7 2014	Brief amicus curiae of The Government of the Kingdom of the Netherlands filed.
Apr 7 2014	Brief amicus curiae of International Rail Transport Committee (CIT) filed.
Apr 15 2014	Reply of petitioner OBB Personenverkehr AG filed.
Apr 16 2014	DISTRIBUTED for Conference of May 2, 2014.
Apr 29 2014	DISTRIBUTED for Conference of May 15, 2014.
May 19 2014	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Dec 15 2014	Brief amicus curiae of United States filed.
Dec 26 2014	Supplemental brief of petitioner OBB Personenverkehr AG filed. (Distributed)
Dec 30 2014	DISTRIBUTED for Conference of January 16, 2015.
Jan 20 2015	DISTRIBUTED for Conference of January 23, 2015.
Jan 23 2015	Petition GRANTED.
Feb 23 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including April17, 2015.
Feb 23 2015	The time to file respondent's brief on the merits is extended to and including June 29, 2015.
Apr 17 2015	Joint appendix filed. (Statement of costs filed)
Apr 17 2015	Brief of petitioner OBB Personenverkehr AG filed.
Apr 23 2015	Brief amicus curiae of International Rail Transport Committee (CIT) filed.
Apr 24 2015	Brief amicus curiae of United States filed.
Apr 24 2015	Brief amici curiae of The Governments of the Kingdom of the Netherlands and the Swiss Confederation filed.
Jun 26 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jun 29 2015	Brief of respondent Carol P. Sachs filed.
Jul 6 2015	Brief amicus curiae of NML Capital, Ltd. filed.
Jul 28 2015	Reply of petitioner OBB Personenverkehr AG filed. (Distributed)

Jul 29 2015	SET FOR ARGUMENT on Monday, October 5, 2015.
Jul 31 2015	CIRCULATED.
Aug 12 2015	Record requested from U.S.C.A. 9th Circuit.
Aug 12 2015	The Record from U.S.C.A. is electronic and located on PACER.
Aug 28 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 5 2015	Argued. For petitioner: Juan C. Basombrio, Costa Mesa, Cal.; and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Jeffrey L. Fisher, Stanford, Cal.
Dec 1 2015	Judgment REVERSED. Roberts, C. J., delivered the opinion for a unanimous Court.

PETITION FOR WRIT OF CERTIORARI

13-1067

In The
Supreme Court of the United States

OBB PERSONENVERKEHR AG,

Petitioner,

v.

CAROL P. SACHS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* ("FSIA"), broadly provides sovereign immunity to foreign states and their instrumentalities, subject to limited statutory exceptions. The first clause of the commercial activity exception provides, *inter alia*, that United States courts have subject matter jurisdiction over claims that are "based upon a commercial activity carried on in the United States by the foreign state." *Id.* § 1605(a)(2).

The questions presented by this Petition are:

1. Whether, for purposes of determining when an entity is an "agent" of a "foreign state" under the first clause of the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2), the express definition of "agency" in the FSIA, the factors set forth in *First National City Bank v. Banco para el Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611 (1983), or common law principles of agency, control.

2. Whether, under the first clause of the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2), a tort claim for personal injuries suffered in connection with travel outside of the United States is "based upon" the allegedly tortious conduct occurring outside of the United States or the preceding sale of the ticket in the United States for the travel entirely outside the United States.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner-defendant is OBB Personenverkehr AG ("OBB"), an instrumentality of a foreign state, the Republic of Austria. Pursuant to Supreme Court Rule 29.6, OBB states, as follows: OBB's stock is wholly held by OBB Holding Group, a joint-stock company organized under Austrian law and created by the Republic of Austria pursuant to the Austrian Federal Railways Act. The sole shareholder of OBB Holding Group is the Austrian Federal Ministry of Transport, Innovation and Technology, an organ of the Republic of Austria.

Respondent-plaintiff is Carol P. Sachs ("Sachs"), a California resident. Sachs brought an action against OBB, OBB Holding Group, and the Republic of Austria based upon personal injuries she incurred at a train station in Innsbruck, Austria. OBB and the Republic of Austria moved to dismiss the complaint for lack of subject matter jurisdiction under the FSIA. Sachs did not oppose the Republic's motion which was granted. The district court, over Sachs's objection, granted OBB's motion to dismiss. Sachs appealed only the dismissal of OBB. Sachs voluntarily dismissed her claims against OBB Holding Group, whom she had never served with process, in the district court. Neither the Republic of Austria nor OBB Holding Group was a party to the appeal to the Ninth Circuit; neither is a party to this Petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner OBB Personenverkehr AG submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court's opinion is unreported and reproduced at Appendix ("App.") at 101. The opinion was issued by Vaughn R. Walker, judge presiding, U.S. District Court for the Northern District of California.

The panel opinion is reported at 695 F.3d 1021, and reproduced at App. at 67. The panel consisted of Judges Bea, Gould and Tallman. Judge Tallman authored the majority opinion, and Judge Gould authored a dissent.

The order for rehearing *en banc* is reported at 705 F.3d 1112. The *en banc* opinion is reported at 737 F.3d 584, and reproduced at App. at 1. The *en banc* panel included Chief Judge Kozinski, and Judges Reinhardt, O'Scannlain, Silverman, Graber, Wardlaw, Fisher, Gould, Berzon, Rawlinson and Hurwitz. Judge Gould authored the *en banc* opinion. Dissents were authored by Judge O'Scannlain (in which Chief Judge

Kozinzki and Judge Rawlison joined) and by Chief Judge Kozinzki.[1]

The Ninth Circuit's order staying mandate pending this petition for certiorari, issued by Judge Gould, is unreported and reproduced at App. at 100.

JURISDICTION

The Ninth Circuit filed the panel opinion on September 13, 2012. App. at 67. The Ninth Circuit granted Sachs's petition for rehearing *en banc* on January 25, 2013. The *en banc* court filed its opinion on December 6, 2013. *Id.* at 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* ("FSIA"), and, in particular, the first clause of the commercial activity exception to foreign sovereign immunity, which provides:

[1] This case presents a close split of judicial views. The district judge and five circuit judges were of the view that OBB has immunity, and eight circuit judges were of the view that the commercial activity exception applied.

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state;

28 U.S.C. § 1605(a)(2).

"Foreign state" is a defined term under the FSIA:

> For purposes of this chapter –
>
> (a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity –
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(a)(1)-(2).

The Appendix reproduces the relevant statutes.

STATEMENT OF THE CASE

A. Introduction

Respondent purchased a Eurail pass from a Massachusetts-based internet ticket seller. After being injured in a train platform accident in Austria in connection with rail travel *entirely outside the U.S.*, Respondent attempted to sue Petitioner, the rail instrumentality of the Republic of Austria, in U.S. District Court, although the FSIA broadly affords sovereign immunity to foreign states and their instrumentalities except under limited exceptions. The Ninth Circuit, in an *en banc* opinion (over two dissents including one by the Chief Judge) reversing the appellate panel and district court, invoked the first clause of the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2), and allowed Respondent's suit, holding that the ticket seller, which had no contractual relationship with Petitioner, was nevertheless Petitioner's "agent" when it sold the Eurail pass and, thus, Petitioner had conducted "commercial activity" in the U.S. sufficient to subject it to jurisdiction. The Ninth Circuit refused to apply

the FSIA's definition of an "agency" of a "foreign state" – under which the ticket seller's activities would not be imputed to Petitioner – and applied common law agency principles that have no basis in the FSIA, and are at odds with *First National City Bank v. Banco para el Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611 (1983). The Ninth Circuit's decision dramatically expands subject matter jurisdiction over claims against foreign states and overrides the express limitations of the FSIA.

The Ninth Circuit also erred by holding that Respondent's claims were "based upon" commercial activity in the U.S. – *i.e.*, the sale of the Eurail pass – rather than the allegedly tortious acts that occurred on a train platform in Austria. That holding misapplies and is directly contrary to *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993); it, too, dramatically expands the basis for subject matter jurisdiction over claims against foreign sovereigns.

B. Overview of FSIA

Under the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless the claim falls within certain narrow statutory exceptions. 28 U.S.C. § 1604. These exceptions are set forth in Sections 1605 and 1607.

The first clause of the "commercial activity" exception provides that a foreign state shall not enjoy sovereign immunity where "the action is based upon

a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2).

Thus, the first clause of the commercial activity exception only applies to: (1) "commercial activity"; (2) "carried on in the United States by the foreign state"; and (3) claims "based upon" that commercial activity. The latter two limitations are at issue here.

With respect to the second limitation, Section 1603(a) provides that "[a] 'foreign state,' except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." Section 1603(b) provides that "[a]n 'agency or instrumentality of a foreign state' means any entity – (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States nor created under the laws of any third country." Thus, Sections 1604(a) and (b) define the term "foreign state" for purposes of all FSIA provisions, with one exception (Section 1608) not at issue here.

With respect to the third limitation, the FSIA does not define the phrase "based upon."

C. Overview of Facts

1. OBB

OBB operates the passenger rail service within Austria, is an instrumentality of the Republic of Austria, and has no offices or operations in the U.S.

2. The Rail Pass Experts

Sachs bought her Eurail pass online from Rail Pass Experts ("RPE"), a Massachusetts-based internet ticket seller. OBB has no contractual relation with RPE. RPE may be a sub-agent of The Eurail Group, an entity incorporated and based in Luxemburg, whose members include 30 rail carriers including OBB. The Eurail pass purchased by Sachs was for travel entirely in Europe and did not provide for transportation from or to the U.S.

3. The Injury

In 2007, as Sachs attempted to board a train in Innsbruck, Austria bound for Prague, she fell between the tracks and her legs were crushed by the train, requiring amputation. Sachs claims that OBB caused her injuries by negligently designing the boarding platforms and moving the train. OBB disagrees and contends that Sachs attempted to board a moving train.

4. Procedural History

Sachs filed a personal injury suit against OBB in U.S. District Court for the Northern District of California, alleging claims for negligence, strict liability for design defect, strict liability for failure to warn about design defect, breach of implied warranty of merchantability, and breach of implied warranty of fitness. OBB brought a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1), (2) and (6), contending, *inter alia*, that the court lacked subject matter jurisdiction under the FSIA. Sachs opposed the motion, contending that her claims satisfied the FSIA commercial activity exception.

a. District Court Decision

The district court granted OBB's motion to dismiss. "The FSIA makes clear that the relevant commercial activity must be undertaken 'by the foreign state.' 28 U.S.C. § 1605(a)(2)." App. at 105. Since Sachs sought to "imput[e] the actions of an alleged 'sub-agent' ([RPE]) to a principal (OBB) via an alleged 'agent' (Eurail Group)," the court followed *Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009) (*per curiam*), *cert. denied*, 120 S.Ct. 3497 (2010) (incorporating the *Bancec* factors). App. at 106-108. Applying *Bancec*, the district court held that "[t]he mere fact that OBB has authorized the Eurail Group to sell and distribute rail passes for travel over its railways, and that such a pass was sold by a third party travel agent to plaintiff is simply insufficient to establish

the day-to-day involvement or 'principal-agent' relationship necessary to defeat the presumption of separate juridical status." *Id.* at 108-109. Sachs's "unwieldy theory of subject matter jurisdiction would seem to ensnare all thirty members of the Eurail Group." *Id.* at 109. "The court finds the connection between OBB and [RPE] too attenuated to establish subject matter jurisdiction." *Id.*

b. Ninth Circuit Panel Decision

The panel affirmed, holding that "Sachs'[s] argument for jurisdiction is scattershot but is premised upon the fact that the sale of the Eurail pass by [RPE] is a commercial activity that should be imputed to OBB But OBB denies that it was commercial activity *by the state* because any connection between [RPE] and OBB is so attenuated." App. at 72.

"We previously grappled with the question of which acts could be attributed to a foreign state under the FSIA in [*Holy See*]." App. at 73. *Holy See* applied *Bancec* to the FSIA jurisdictional analysis, joining the Fifth and D.C. Circuits. 557 F.3d at 1079-1080. *Bancec* had considered when acts of a foreign state may be attributed to its agent. 462 U.S. at 620. This Court held that the FSIA has a "presumption of separate juridical status" for agents of foreign states that may be overcome when (1) "a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created" or

(2) recognizing the presumption "would work fraud or injustice." *Id.* at 624 and 629.

The panel held that "Sachs's allegations do not withstand [*Bancec*] scrutiny." App. at 76. Sachs could not show day-to-day control by OBB over RPE. At best, Sachs could allege that "OBB, as a part-owner along with thirty other owners, wielded some degree of control over Eurail Group and was aware that Eurail Group used U.S. sales agents like [RPE]." *Id.* at 76-77. But OBB was not even aware that the RPE existed. *Id.* at 77. Nor was OBB "involved in Eurail Group's affairs to this high degree." *Id.* "Eurail Group has its own independent management." *Id.* "The connection between OBB and [RPE] is not close enough under the first prong of the *Bancec* standard." *Id.* The second prong also cannot be met. "OBB itself engages in no commercial activity in the United States, presumably in part to retain immunity from suit in American courts. Any injustice that results is no greater than in the mine-run of cases – jurisdiction over a foreign state is, after all, ordinarily not available." *Id.* The panel viewed the facts as "a far cry" from those in *Bancec*. *Id.*

c. Decision Upon Rehearing *En Banc*

The *en banc* majority reversed, holding that RPE's commercial acts in the U.S. could be imputed to OBB, and Sachs's claims were based upon that commercial activity.

First, the Ninth Circuit broadly held: "[a] foreign-state owned common carrier, such as a railway or airline, engages in commercial activity in the United States when it sells tickets in the United States through a travel agent regardless of whether the travel agent is a direct agent or subagent of the common carrier." App. at 4.

Rather than applying the FSIA's express and limited definition of an "agency" of a "foreign state" to determine if the acts of RPE could be attributed to OBB, the Ninth Circuit resorted to "broad agency principles" and "traditional agency principles." App. at 15. "As long as the agent or subagent acts with actual authority, those acts can be imputed to the foreign state." *Id.* Relying simply on the fact that OBB honored the Eurail pass, it held that the commercial acts of RPE could be attributed to OBB. *Id.* at 18-19. "Because we conclude RPE acted as an authorized agent of OBB, we impute RPE's sale of the Eurail pass in the United States to OBB." *Id.* at 19-20.

The Ninth Circuit rejected OBB's contention that common-law principles of agency are inapplicable under the plain language of the FSIA unless the alleged agent first meets the statutory definition of "agency" of a foreign state under Section 1603(b) of the FSIA. App. at 21-22.

To justify its decision not to apply the FSIA definition, the Ninth Circuit relied on "common sense" and its "belief" of what Congress had intended:

"Common sense tells us that an agent that carries on commercial activity for a foreign sovereign in the United States does not need to be an agency or instrumentality of a foreign state under § 1603(b)." App. at 23. Similarly, "we believe that Congress contemplated that the sale of tickets by travel agents within the United States for passage on foreign-sovereign owned common carriers would constitute 'commercial activity carried on in the United States by the foreign state.'" *Id.* at 26-27.

Second, the Ninth Circuit held that Sachs's claims were "based upon" the subject commercial activity. Because "the sale of the Eurail pass is an essential fact that Sachs must prove to establish her passenger-carrier relationship with OBB, a nexus exists between an element of Sachs's negligence claim and the commercial activity in the United States." App. at 35. "Because the sale of the Eurail pass in the United States forms an essential element of each of Sachs's claims, we conclude that Sachs's claims are 'based upon a commercial activity carried on in the United States' by OBB." *Id.* at 40.

In dissent, Judge O'Scannlain (joined by Chief Judge Kozinski and Judge Rawlinson) disagreed with the majority, stating that their common law test was far too broad and disregarded the FSIA definition of "agency." Applying the presumption of consistent usage to the term "foreign state" and finding that *Bancec* "fits the statutory text well," he concluded that RPE's acts could not be imputed to OBB. App. at 47, 51-52 and 55-57.

Chief Judge Kozinski wrote a separate dissent focusing on the "based upon" requirement, finding the majority's holding in conflict with this Court's decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). This Court had observed that the phrase "based upon" "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." App. at 62 (quoting *Nelson*, 507 U.S. at 357). This Court also clarified that it was not "suggest[ing] that the first clause of § 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state." *Id.* (citing *id.* at 358 n. 4). Judge Kozinski stated that "[s]ome of our cases have misread this holding – that a claim *can* be based upon commercial activity even if proving that activity won't establish *every* element of the claim – for an endorsement of the converse proposition – that a claim *is* based upon commercial activity so long as proving that activity will establish at least *one* element of the claim." *Id.* at 63. He concluded that the majority's "broad interpretation" of the "based upon" requirement "runs contrary to our 'background rule that foreign states are immune from suit,' subject only to 'narrow exceptions.'" *Id.* (citations omitted).

Stay of mandate was granted by Judge Gould.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT HAS DISREGARDED THE FSIA STATUTORY LIMITATIONS AND THIS COURT'S DECISION IN *BANCEC* AND BROADLY EXPANDED SUBJECT MATTER JURISDICTION UNDER THE COMMERCIAL ACTIVITY EXCEPTION OF THE FSIA, CREATING A CIRCUIT SPLIT, AND UNCERTAINTY AND CONFUSION IN THE LAW

Relying on general common law principles, the Ninth Circuit has held, broadly, that "[a] foreign-state owned common carrier, such as a railway or airline, engages in commercial activity in the United States when it sells tickets in the United States through a travel agent regardless of whether the travel agent is a direct agent or subagent of the common carrier." App. at 4. Under this holding, the sale of a travel ticket in the U.S. is sufficient to establish commercial activity in the U.S., *regardless of whether travel occurs entirely outside of the U.S.*

The Ninth Circuit should have applied the FSIA definitions of a "foreign state" and "agency," which are designed to limit application of the subject exception to commercial activity in the United States "by the foreign state." In the alternative, the Ninth Circuit should have applied *Bancec* to determine whether RPE's acts could be imputed to OBB. Had the Ninth Circuit applied the FSIA definition or *Bancec*, it would have concluded that RPE's acts cannot be imputed to OBB and the subject exception does not

apply. The *en banc* decision is in conflict with relevant decisions of this Court and other Circuits.

A. The Ninth Circuit's Holding Establishes a Precedent Divorced from the Statutory Text of the FSIA, Which This Court Should Correct

Passage of the FSIA followed ten years of academic and legislative efforts to create a consistent framework for determination of immunity when foreign states are sued. *See* HR Rep. No. 94-1487, p. 9 (1976), U.S. Code Cong & Admin. News 1976, p. 6607. "Congress responded to the inconsistent application of sovereign immunity by enacting the FSIA in 1976." *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010). "Congress sought to remedy these problems by enacting the FSIA, *a comprehensive statute* containing a set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Rep. of Austria v. Altmann*, 541 U.S. 677, 691 (2004) (emphasis added) (citing *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983)).

Thus, the FSIA is the "*sole basis* for obtaining jurisdiction over a foreign state in our courts." *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (emphasis added); *Nelson*, 507 U.S. at 355 ("Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court

lacks subject-matter jurisdiction over a claim against a foreign state."). By applying common law agency principles, the Ninth Circuit contradicts this Court's holding that the FSIA is the "*sole basis*" for obtaining jurisdiction over a foreign state. The Ninth Circuit's opinion is also contrary to its prior rulings and creates Circuit splits.[2]

When analyzing the FSIA, "we begin with the text of the statute." *Limtiaco v. Camacho*, 549 U.S. 483, 488 (2007). Under the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless the case falls within certain narrow statutory exceptions. 28 U.S.C. § 1604.

The only exceptions to immunity under the FSIA are set forth in Sections 1605 and 1607. Courts have consistently held that these exceptions are interpreted *narrowly*. *E.g.*, *McKesson Corp. v. Islamic Rep. of Iran*, 672 F.3d 1066, 1075 (D.C. Cir. 2012) ("FSIA established a broad grant of immunity for foreign

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[2] *See, e.g.*, *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1055 (9th Cir. 2009) ("states are immune from the jurisdiction of United States courts, subject only to specific exceptions . . . sole basis for obtaining jurisdiction over a foreign state in federal court is the existence of an exception to the FSIA."); *FG Hemisphere Assoc., LLC v. République du Congo*, 455 F.3d 575, 584 (5th Cir. 2006) ("FSIA sets forth the sole and exclusive standards used by courts in the United States to resolve sovereign immunity issues."); *Cabiri v. Gov't of Rep. of Ghana*, 165 F.3d 193, 196 (2d Cir. 1999) (FSIA is "sole source for subject matter jurisdiction over any action against a foreign state.").

sovereigns that can only be abrogated by one of the statute's narrowly drawn exceptions."); *Garb v. Rep. of Poland*, 440 F.3d 579, 587 (2d Cir. 2006) (interpreted commercial activity exception "narrowly"); *Frovola v. Union of Soviet Soc. Republics*, 761 F.2d 370, 377 (7th Cir. 1985) (waiver exception construed "narrowly"). The Ninth Circuit has concurred. *See Af-Cap, Inc. v. Chevron Overseas Ltd.*, 475 F.3d 1080, 1088 (9th Cir. 2007) (construed waiver exception narrowly).

However, the *en banc* opinion parts with settled law and holds that "Congress intended the commercial-activity exception *to be read broadly*," invoking traditional agency principles. App. at 15 ("Under traditional agency principles, the foreign state may engage in commerce in the United States indirectly by acting through its agents or subagents. As long as the agent or subagent acts with actual authority, those acts can be imputed to the foreign state.") (citation omitted).

The commercial activity exception applies where "the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). It imposes three limitations: (1) there must be "commercial activity"; (2) "carried on in the United States by the foreign state"; and (3) the lawsuit must be "based upon" that commercial activity.

With respect to the second limitation, Congress has mandated that the Section 1603 definitions apply to *all provisions* in the FSIA except only Section 1608 (a service of process clause). Subsection (a) states that

"[a] 'foreign state,' except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." Subsection (b) then provides that "[a]n 'agency or instrumentality of a foreign state' means any entity – (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States nor created under the laws of any third country."

Thus, to determine whether the acts of RPE were acts "by the foreign state," the Ninth Circuit should have looked to the definitions of "foreign state" and "agency" to decide if RPE is an agent of OBB. This Court instructed in *Samantar* that the definition of "foreign state" in the FSIA "*specifically delimits* what counts as an 'agency or instrumentality.'" 560 U.S. at 314 (citing Section 1603(b)) (emphasis added).[3] The Ninth Circuit's invocation of common law to determine whether an agent's acts can be imputed to the

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[3] The issue in *Samantar* was whether a government official was a "foreign state" under the FSIA. This Court held that, although such an interpretation was literally possible, that is not what the FSIA definition provides. This Court also rejected efforts to look outside of the FSIA to justify such a reading. 650 U.S. at 314-326; *accord, Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-477 (2003) (analyzing FSIA definition to determine whether subject entity was instrumentality of foreign state).

foreign state conflicts with *Samantar* and other precedents that apply FSIA definitions to make the instrumentality or agency determination. *E.g., In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 96 F.3d 932, 941 (7th Cir. 1996); *State Bank of India v. NLRB*, 808 F.2d 526, 535 (7th Cir. 1986); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1106 (5th Cir. 1985); *Alejandre v. Telefonica Larga Distancia, de Puerto Rico, Inc.*, 183 F.3d 1277, 1283 (11th Cir. 1999).

If the Ninth Circuit had applied the definition in the FSIA, it would have necessarily concluded that the acts of RPE cannot be imputed to OBB. In its quest to avoid this result, it ignored the plain language of the FSIA, and opened the flood gates to litigation with a vague common law agency test that reinstates the pre-codification uncertainty the FSIA was intended to avoid.

As Judge O'Scannlain's dissent noted, the *en banc* opinion is contrary to the canon of consistent usage, wherein "identical words used in different parts of the same act are intended to have the same meaning." *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1990); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008) (courts must "ensure that the statutory scheme is coherent and consistent.").

B. The Ninth Circuit's Common Law Agency Test Is Contrary to FSIA Precedents and Inserts Uncertainty into the Law, Warranting Review by This Court

The Ninth Circuit based its decision not to apply the FSIA's definition of "agency" and to adopt a vague common law agency test on "common sense" and the majority's "belief" as to congressional intent. These justifications conflict with settled law that the provisions of the FSIA are the "sole basis" for asserting jurisdiction over claims against foreign states and instrumentalities.

The Ninth Circuit stated that "*[c]ommon sense* tells us that an agent that carries on commercial activity for a foreign sovereign in the United States does not need to be an agency or instrumentality of a foreign state under § 1603(b)." App. at 23 (emphasis added). This "common sense"-based departure from the FSIA express definition violates the Congressional mandate that Sections 1604(a) and (b) establish the definition of "foreign state" for purposes of *all provisions* in the FSIA except Section 1608. Because Congress has announced the only exception, the Ninth Circuit was required to apply the definition to its analysis. *See Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970) ("This conclusion is required because Congress itself set forth the only exceptions to the statute, and those exceptions do not include this situation.").

Similarly, the Ninth Circuit stated that "*we believe* that Congress contemplated that the sale of tickets by travel agents within the United States for passage on foreign-sovereign owned common carriers would constitute 'commercial activity carried on in the United States by the foreign state.' 28 U.S.C. § 1605(a)(2)." App. at 26-27. The court offered no basis for this belief. Rather, it reasoned that "[t]he position that OBB advances would negate the possibility of commercial activity by a state-owned railway or airline within the United States through a travel agent. *We cannot believe* that this is what Congress intended." App. at 25 (emphasis added). "*There is no reason to think* that Congress intended such a chaotic result." App. at 27 (emphasis added). The court's concerns lack merit. For example, if a foreign carrier undertakes to transport a passenger from or to the U.S., the carrier would have engaged in commercial activity "in" the U.S. and be subject to suit here. Where, as here, transportation was provided *entirely outside of the U.S.*, there is no reason to bring the foreign carrier into U.S. court. The "chaos" has been created by the Ninth Circuit opening the door to litigation on a vague common law test.

Another justification of the *en banc* opinion is that the FSIA allegedly is not in "derogation" of common law principles like agency law:

> "To abrogate common-law principles of agency, the FSIA must speak directly to the question addressed by the common law. Because the FSIA codified our common law of

> sovereign immunity, *we begin with the presumption that the statute maintains common-law principles.* That Congress defined the term 'agency or instrumentality of a foreign state' *does not convince us that Congress intended to displace common-law agency principles* under the statute for purposes of assessing commercial activity within the United States."

App. at 23-24 (citations omitted; emphasis added).

However, the conclusion that the FSIA is not in derogation of the common law was disputed in a dissent in another recent Ninth Circuit case, *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1044 (9th Cir. 2010) (Gould, dissent, joined by Chief Judge Kozinski), which dissent reached the exact opposite conclusion:

> "When the FSIA establishes a comprehensive system for finding exceptions to sovereign immunity in its specified categories, thus outlining when sovereign immunity should be considered to have been waived permitting suit against foreign nations in the United States, *these statutory exceptions to sovereign immunity, being in derogation of common law, must be strictly construed, not expansively construed.* If we give a strict construction to § 1605(a)(3), I think we logically would say that it is intended to cover violations of international law by the nation whose sovereignty is waived. But the majority, saying it covers violations of international law by anyone, is giving this provision, in

> derogation of the common law concept of sovereign immunity, *an expansively unreasonable construction.*"

616 F.3d at 1044 (Gould, dissenting) (emphasis added). The *en banc* opinion invokes the derogation argument also to reach an expansively unreasonable construction.

Further, the *en banc* opinion creates a clear split with the Seventh Circuit which has held that since FSIA "exceptions *are in derogation of the common law, we must not read them broadly.* Statutes in derogation of the common law are *narrowly construed.*" *Haven v. Polska*, 215 F.3d 727, 731 (7th Cir. 2000) (emphasis added).

By going outside of the FSIA, the *en banc* opinion also disregards Congress's intent: "The central premise of the FSIA is that 'decisions on claims by foreign states to sovereign immunity are best made by the judiciary *on the basis of a statutory regime which incorporates standards recognized under international law.*'" *Cassirer*, 616 F.3d at 1041 (emphasis added) (Gould, dissent; Kozinski concurring) (citing H.R.Rep. No. 94-1487, at p. 14 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613).

Further, the *en banc* opinion tried to distinguish between invocation of immunity and application of an exception. App. at 21-23. This is an artificial distinction because these are simply two steps in the same immunity determination, and the FSIA definitions apply to Sections 1604 and 1605. As noted by Judge

O'Scannlain, "[t]he majority treats the meaning of 'foreign state' for the purposes of § 1604 and the meaning of 'foreign state' for the purposes of § 1605 as separate inquiries. *See* Op. at 595 (contrasting the status required to claim sovereign immunity and the status required for activity to be attributable under the commercial-activity exception). In light of the presumption of consistent usage and Supreme Court precedent applying it to the FSIA, I cannot accept the majority's assumption that the interpretation of this term differs so greatly between provisions."). App. at 49.

Finally, this Court and lower courts have rejected attempts to create jurisdiction against foreign states by turning to extraneous sources where there is none under the FSIA. *See Amerada Hess*, 488 U.S. at 433-438; *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 246 (2d Cir. 2003); *Carpenter v. Rep. of Chile*, 610 F.3d 776, 778-779 (2d Cir. 2010). The Ninth Circuit also has created a Circuit split by using extraneous common law agency principles to shoehorn jurisdiction where there is none under the FSIA.

The *en banc* opinion creates confusion in the law which this Court should correct. It does not even clarify what "common law principles" it applies, opening the door to application of common law principles as diverse as the law of the 50 States. Thus, whether a foreign state is entitled to sovereign immunity *could differ from state to state, and judge to judge.* By concluding that "[a]s long as the agent or subagent acts with actual authority, those acts can be

imputed to the foreign state," App. at 15, the opinion re-wrote the FSIA, since the agency definition and subject exception *contain no reference* to the concept of authority.

In sum, the Ninth Circuit has ignored this Court's admonition that the FSIA is a "*comprehensive statute*," *Altmann*, 541 U.S. at 691, and improperly reached outside of the FSIA to create jurisdiction. There was no need to do so because the FSIA defines the term "agency." "It is a proper part of the judicial function to make law as a necessary by-product of the process of deciding actual cases and controversies. But to reach out so blatantly and unnecessarily to make new law in a case of this kind is unabashed judicial activism." *Florida v. Wells*, 495 U.S. 1, 13 (1990) (Stevens, concurring).[4]

C. This Court Should Clarify Whether the FSIA Definitions or *Bancec* Governs the Analysis Whether the Acts of an Alleged Agent May Be Imputed to a Foreign State

Some Circuits invoke *Bancec* to determine whether acts of an alleged agent may be imputed to a

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[4] As Judge O'Scannlain's notes, *Barkanic v. Gen. Admin. of Civil Aviation of the Peoples Rep. of China*, 822 F.2d 11 (2d Cir. 1987) and *Kirkham v. Societe Air France*, 429 F.3d 288 (D.C. Cir. 2005), did not "analyze when the acts of agents can be attributed to a foreign state," App. at 57, and, there, travel originated or ended in the U.S.

foreign state. Creating a split, the Ninth Circuit declined to apply *Bancec* contradicting its prior decision, *Holy See, supra*. The district court and panel applied *Bancec*, like Judge O'Scannlain's dissent. This Court should clarify whether the FSIA definition or one of these views should prevail.

This Court in *Bancec* recognized a presumption of separate juridical status for alleged agents of foreign states, and held that the presumption would be negated (1) "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created" or (2) where recognizing the presumption "would work fraud or injustice." 462 U.S. at 629-634.

The Ninth Circuit refused to follow *Holy See*, App. at 20-21, which held that "*Bancec* provides a workable standard for deciding" the question whether "a particular individual or corporation is an agent of a foreign state," 557 F.3d at 1079. It has created a split with the Fifth and D.C. Circuits. *See Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533-534 (5th Cir. 1992) ("Although *Bancec*'s description of the basis for disregarding the separate juridical status of foreign agencies occurred in a discussion of substantive liability, its principles have been applied to FSIA jurisdictional issues. Hence, where jurisdiction depends on an allegation that the particular defendant was an agent of the sovereign, the plaintiff bears the burden of proving this relationship."); *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 847-848 (D.C. Cir. 2000) (same).

Rather, the district court's ruling was consistent with the Fifth and D.C. Circuits. Applying *Bancec*, it held that "[t]he mere fact that OBB has authorized the Eurail Group to sell and distribute rail passes for travel over its railways" made a "connection between OBB and the Rail Pass Experts *too attenuated* to establish subject matter jurisdiction." App. at 108-109 (emphasis added).

The appeals panel affirmed also following *Bancec* as applied by *Holy See*, which held that Doe's allegations were insufficient to overcome the presumption of the Holy See's separateness. 557 F.3d at 1079. Doe had not alleged "day-to-day, routine involvement" by the Holy See in its alleged agents' operations to establish a principal-agent relationship. *Id.* Doe also had "not alleged that the Holy See inappropriately used the separate status of the corporations to its own benefit, as in *Bancec*, or that the Holy See created the corporations for the purpose of evading liability for its own wrongs." *Id.* at 1080. The appellate panel here also held that Sachs's "allegations do not withstand this scrutiny." App. at 76.

This Court should articulate the applicable test. The Ninth Circuit has displayed a recent tendency to use agency analysis as the basis for subjecting foreign corporations, and now, foreign states to jurisdiction. It did so in *Daimler AG v. Bauman*, 571 U.S. ___, 134 S.Ct. 746 (2014), and was reversed. There, the Ninth Circuit premised jurisdiction on ascertaining the "importance" of an agent's actions gauged by a principal's "hypothetical readiness to perform those

services if [the agent] did not exist" – a standard that "will always yield a pro-jurisdiction answer." 134 S.Ct. at 749.

The *en banc* opinion's agency formulation also is stacked for a "pro-jurisdiction answer." Because foreign states invariably act through agents, any commercial activity in the U.S. by an alleged agent of a foreign state loosely defined under common law may create jurisdiction over the state. The Ninth Circuit has adopted a liberal test that (1) "where a common carrier authorizes a travel intermediary to 'issue tickets on its behalf and to collect and hold customer payment, the intermediary acts as the [carrier's] agent,'" and (2) "as to third parties, an action taken by a subagent carries the legal consequences for the principal that would follow were the action instead taken by the appointing agent." App. at 18 (citations omitted).

The FSIA's language does not compel any "agency" standard beyond that provided in its express and limited definition. The Ninth Circuit's invocation of vague common law principles disregards this Court's holding that the FSIA "specifically delimits what counts as an agency." *Samantar*, 560 U.S. at 314-315. If courts must look outside the FSIA, it would be helpful to have this Court clarify whether *Bancec* is the applicable test. *Bancec*, as applied here, would give deference to the presumption in favor of immunity, but is a test that still is not grounded in the plain text of the FSIA definition.

II. THE NINTH CIRCUIT HAS MISREAD THIS COURT'S PRECEDENT REGARDING THE FSIA'S REQUIREMENT THAT CLAIMS MUST BE "BASED UPON" COMMERCIAL ACTIVITY BY THE FOREIGN STATE, FURTHER EXPANDING JURISDICTION BEYOND THE LIMITS OF THE FSIA, AS IDENTIFIED BY JUDGE KOZINSKI IN DISSENT

With respect to the third limitation, the FSIA does not define the meaning of the term "based upon" in 28 U.S.C. § 1605(a)(2), but this Court twenty years ago adopted a pragmatic approach to that analysis. Under that approach, courts must identify the gravamen of the action and the specific commercial acts that the claims are "based upon" in order to determine whether the exception applies. *See Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). The *en banc* opinion misreads *Nelson* and creates a broad test that merely requires a nexus between any act in the subject course of events and any element of a claim under U.S. law. *Nelson* recognized the perils of such an overly permissive reading of the "based upon" requirement. This Court should correct the erroneous *en banc* opinion.

As Judge Kozinski observed in dissent, the Ninth Circuit's holding that Sachs's claim is "based upon" commercial activity in the U.S. "conflict[s] with Supreme Court precedent." App. at 62.

As held in *Nelson*, the "based upon" phrase "is read most naturally to mean those elements of a

claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. at 357 (citing with approval *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985) (focus should be on the "gravamen of the complaint")); *accord, Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147, 156 (2d Cir. 2007) (under the "based upon" language, the "'degree of closeness' must exist between the commercial activity and the gravamen of the plaintiff's complaint.").

However, this Court clarified that "[w]e do not mean to suggest that the first clause of §1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state, and we do not address the case where a claim consists of both commercial and sovereign elements." *Nelson*, 507 U.S. at 358 n. 4. As Judge Kozinski notes, the Ninth Circuit misreads this clarification – "that a claim *can* be based upon commercial activity even if providing that activity won't establish *every* element of the claim – for an endorsement of the converse proposition – that a claim *is* based upon commercial activity so long as proving that activity will establish at least *one* element of the claim." App. at 63 (emphasis in original).

First, the Ninth Circuit's opinion is contrary to *Nelson*'s holding that the focus should be on the theory of the case or gravamen of the complaint. In *Nelson*, an American was recruited in the U.S. to work for a state hospital in Saudi Arabia. After complaining of conditions there, he was arrested and harmed. When he returned to the U.S., he sued Saudi Arabia. This Court held that the claim was not "based

upon" the commercial activity in the U.S., but the torts that occurred in Saudi Arabia, and thus the commercial activity exception was not satisfied:

> "We begin our analysis by identifying the particular conduct on which the Nelsons' action is 'based' for purposes of the Act."

Nelson, 507 U.S. at 356-357.

> "In this case, the Nelsons have alleged that petitioners recruited Scott Nelson for work at the hospital, signed an employment contract with him, and subsequently employed him. *While these activities led to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons' suit. Even taking each of the Nelsons' allegations about Scott Nelson's recruitment and employment as true, those facts alone entitle the Nelsons to nothing under their theory of the case.* The Nelsons have not, after all, alleged breach of contract, *see supra,* at 1476, but personal injuries caused by petitioners' intentional wrongs and by petitioners' negligent failure to warn Scott Nelson that they might commit those wrongs. *Those torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons' suit."*

Nelson, 507 U.S. at 358 (emphasis added).

Similarly, Sachs's claims are "based upon" the alleged tortious acts of OBB in Austria, and not on the sale of the rail pass in the U.S. The commercial

activity in the U.S., without more, entitles Sachs to nothing. The Ninth Circuit has done away with the "based upon" requirement by holding that it suffices that one element of any claim be based on any fact occurring in the U.S.; here, the ticket sale by RPE unrelated to OBB.[5]

It is noteworthy that the FSIA contains a tortious act exception. 28 U.S.C. § 1605(a)(5). However, Congress created jurisdiction only over torts occurring in the United States. *See Amerada Hess*, 488 U.S. at 439, 440-441; *Frovola,* 761 F.2d at 379. Thus, Congress indicated that acts involving torts occurring entirely overseas (like this case) would not be grounds for jurisdiction under the FSIA. The Ninth Circuit runs afoul of the FSIA for it attempts to create tort jurisdiction where Congress has said there is none.

And second, the *en banc* opinion "invites plaintiffs' lawyers to manufacture jurisdiction through artful pleading" (737 F.3d at 612, Chief Judge Kozinski dissent) – a practice which this Court warned about in *Nelson*:

> "In addition to the intentionally tortious conduct, the Nelsons claim a separate basis

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[5] In contrast, in *Terenkian v. Rep. of Iran*, 694 F.3d 1122 (9th Cir. 2012), the Ninth Circuit had held that under *Nelson*, "where a plaintiff's claim was based on activities [outside of the U.S.] (and sounded in tort rather than contract), the plaintiff could not abrogate the foreign nation's sovereign immunity under the first clause of the FSIA by pointing to preliminary commercial activities in the United States."). *Id.* at 1132-1133.

> for recovery in petitioners' failure to warn Scott Nelson of the hidden dangers associated with his employment. The Nelsons allege that, at the time petitioners recruited Scott Nelson and thereafter, they failed to warn him of the possibility of severe retaliatory action if he attempted to disclose any safety hazards he might discover on the job. *See supra,* at 1476. In other words, petitioners bore a duty to warn of their own propensity for tortious conduct. *But this is merely a semantic ploy. For aught we can see, a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it. To give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity."*

Nelson, 507 U.S. at 363 (emphasis added).

By holding that the "based upon" limitation of the commercial activity exception is satisfied merely by establishing that "an element" of a claim (here, the ticket sale) occurred in the United States, the Ninth Circuit contravenes this Court's admonition in *Nelson*. Here, the claims are "based upon" allegedly tortious conduct that occurred entirely outside of the United States. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 758 (2004) ("[i]t will virtually always be possible to assert that the negligent . . activity that injured the plaintiff

[abroad] was the consequence of faulty training, selection or supervision . in the United States").

As Chief Judge Kozinzki observed, since "plaintiff's claim arises from events that transpired entirely in Austria, it isn't 'based upon' commercial activity carried on in the United States." App. at 62. "Our case illustrates the expansive sweep of the majority's approach. Plaintiff had a train ticket to travel from Austria to the Czech Republic. She was injured due to defendant's alleged negligence when she tried to board. The injury and any negligence occurred in Austria. But, because plaintiff happened to buy her ticket online from a vendor in Massachusetts, a federal court in California now asserts power to hale the Austrian government before it and make it defend against a claim based on facts that occurred in Austria. This makes as much sense as forcing Mrs. Palsgraf to litigate her case in Vienna." App. at 65. In the age of the internet, these concerns apply broadly because one can purchase, online, a ticket for a variety of services and functions entirely overseas.

In sum, although *Nelson* focused on the "theory" and "gravamen" of the case, the *en banc* opinion focuses on whether any "element" of a legal claim has a nexus to the United States, holding that the mere sale of a ticket confers jurisdiction. Other Circuits are in conflict. *See, e.g., Transatlantic Shiffahrtskontor GMBH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 390 (2d Cir. 2000) (term implies a "causal relation"); *Gen. Elec. Capital Corp. v. Grossman,* 991 F.2d 1376, 1382-1384 (8th Cir. 1993) (enquiry is where commercial activity "primarily"

took place). Therefore, this Court should clarify further the "based upon" requirement.

III. THE IMMEDIATE FOREIGN POLICY IMPLICATIONS AND RADICAL EXPANSION OF FEDERAL JURISDICTION FOR FOREIGN STATES COUNSELS IMMEDIATE REVIEW

> "By reason of its authority over foreign commerce and foreign relations, Congress has the *undisputed power* to decide, as a matter of federal law, *whether and under what circumstances foreign nations should be amenable to suit in the United States.* Actions against foreign sovereigns in our courts *raise sensitive issues concerning the foreign relations of the United States*, and the primacy of federal concerns is evident."

Verlinden, 461 U.S. at 493 (emphasis added).

As noted, passage of the FSIA followed ten years of academic and legislative efforts to create a consistent jurisdictional framework. The commercial activity exception is the FSIA's "*most significant* exception" to foreign sovereign immunity. *Rep. of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) (emphasis added).

Thus, the Ninth Circuit's radical expansion of jurisdiction warrants certiorari because it may have serious foreign policy implications. "In interpreting the FSIA, we are mindful that judicial resolution of

cases bearing significantly on sensitive foreign policy matters, like the case before us, might have serious foreign policy implications which courts are ill-equipped to anticipate or handle." *Sampson v. Fed. Rep. of Germany,* 250 F.3d 1145, 1155-1156 (7th Cir. 2001); J.H. Trotter, *Narrow Construction of the FSIA Commercial Activity Exception: Saudi Arabia v. Nelson,* 33 Va. J. Int'l L. 717, 733-734 (1993) ("As exceptions undergo judicial expansion the strains on foreign policy intensify."). "Clear boundaries for the foreign sovereign immunity exceptions are crucial to the FSIA's role of balancing stable international commerce against the effective execution of foreign policy. A vague policy of expansive jurisdiction could appear unduly arbitrary and invite reciprocal scrutiny of U.S. law enforcement by foreign courts." *Id.* at 733.

When U.S. courts take an expansive approach to jurisdiction, there is also the risk of the assertion of retaliatory jurisdiction. *See* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 15 (1987) (several countries have enacted "retaliatory jurisdictional laws" in which their courts may exercise jurisdiction over persons "in circumstances where the courts of the foreigner's home state would have asserted jurisdiction").

Recently in *Daimler AG v. Bauman,* 134 S.Ct. 746 (2014), this Court held that "[t]he Ninth Circuit paid little heed to the risk to international comity its expansive view of general jurisdiction posed." *Id.*

at 763. While *Daimler* dealt with personal jurisdiction over foreign private entities, the same concern applies here, *again*, with respect to the *en banc* opinion in the context of foreign states. The role of the FSIA as a jurisdictional gatekeeper is underscored by the fact that Due Process limitations on personal jurisdiction may not apply to foreign states. *See, e.g., Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 694 (7th Cir. 2012); *Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Rep.*, 582 F.3d 393, 398-400 (2d Cir. 2009); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95-100 (D.C. Cir. 2002).

If left standing after *Daimler*, the *en banc* opinion makes jurisdiction over foreign states broader than that over foreign private entities. This result is contrary to the FSIA's presumption of immunity. "A primary purpose of the FSIA is to make it difficult for private litigants to bring foreign governments into court, thereby avoiding affronting them." *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 207 (3d Cir. 2003).

Other nations "do not share the uninhibited approach to personal jurisdiction advanced by the [Ninth Circuit] Court of Appeals. " *Daimler*, 134 S.Ct. at 763. "In the European Union a corporation may generally be sued in the nation in which it is 'domiciled,' a term defined to refer only to the location of the corporation's 'statutory seat,' 'central administration,' or 'principal place of business.'") *Id.* A broad assertion of jurisdiction can harm our dealings with foreign states. "The Solicitor General informs

that 'foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments.'" *Id.* at 763.

The *en banc* opinion is far-reaching. Even it recognizes that "there are many national airlines and railroads worldwide that may market and sell tickets through agents or subagents in the U.S.," and that "throughout the world many foreign states own and operate legally independent passenger railways and airlines, which may qualify for sovereign immunity as an 'agent or instrumentality of a foreign state.'" App. at 26 and n. 8-9. The *en banc* opinion will impact operations of instrumentalities of countries across the globe.

IV. THIS CASE, IN ITS CURRENT POSTURE, IS A GOOD VEHICLE FOR RESOLVING THESE IMPORTANT ISSUES

The legal issues presented here are cleanly framed. As Judge O'Scannlain observed, the "analytical task in this case is made easier by the limited nature of the parties' arguments." App. at 44. "[T]he only exception relevant to this appeal is the first clause of the commercial-activity provision" of the FSIA. *Id.* There were two distinct holdings: (1) what it means for activity to be "carried on in the United States *by the foreign state*"; and (2) what it means that the plaintiff's suit must be "based upon" that

activity. Both holdings are dispositive and create conflicts with this Court's and other Circuits' precedents.

The facts herein allow this Court to explore the limits of the first clause of the commercial activity exception in a manner that more complicated facts would not allow. OBB has been dragged into a U.S. court on the basis of an alleged sub-agent's actions, where OBB had no contractual relationship with, exercised no control over, nor had any management interest in, the sub-agent. As to the "based upon" requirement, this case presents the extreme situation where the alleged tort occurred entirely on foreign soil, with the purchase of a rail pass online being the only claimed nexus to the United States.

This Court has the benefit of the issues presented having been fully vetted, with majority and dissenting opinions by both the original and *en banc* panels.

From a procedural posture, OBB has not litigated the merits. The importance of resolving these issues now is reflected in the right of foreign states to interlocutory appeals of a denial of a motion to dismiss based on the FSIA. *See, e.g., Blue Ridge Investments, L.L.C. v. Republic of Argentina*, 735 F.3d 72, 80-81 (2d Cir. 2013) ("the general rule [is] that the denial of foreign sovereign immunity is immediately appealable").

Moreover, there is nothing to further develop. The opinion is dispositive and not open to change on remand.

Finally, this Court recently granted certiorari in another case involving the FSIA, *Rep. of Argentina v. NML Capital, Ltd.*, 134 S.Ct. 895 (2014). However, it involves the limited issue of post-judgment discovery in aid of execution, and not the broader provisions which govern whether a lawsuit may be initiated, at issue here.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 5, 2014

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAROL P. SACHS, *Plaintiff-Appellant,* v. REPUBLIC OF AUSTRIA; OBB HOLDING GROUP; OBB PERSONENVERKEHR AG, *Defendants-Appellees.*	No. 11-15458 D.C. No. 3:08-cv-01840-VRW OPINION

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted En Banc
March 21, 2013 – San Francisco, California

Filed December 6, 2013

Before: Alex Kozinski, Chief Judge, Stephen Reinhardt, Diarmuid F. O'Scannlain, Barry G. Silverman, Susan P. Graber, Kim McLane Wardlaw, Raymond C. Fisher, Ronald M. Gould, Marsha S. Berzon, Johnnie B. Rawlinson, and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Gould;
Dissent by Judge O'Scannlain;
Dissent by Chief Judge Kozinski

SUMMARY*

Foreign Sovereign Immunities Act

Reversing the district court's dismissal of an action for lack of subject matter jurisdiction, the en banc court held that a foreign-state owned common carrier engages in commercial activity in the United States, and thus is not immune from suit under the Foreign Sovereign Immunities Act, when it sells tickets in the United States through a travel agent, regardless of whether the travel agent is a direct agent or subagent of the common carrier.

Agreeing with the Second and D.C. Circuits, the en banc court held that the sale of a Eurail pass to the plaintiff could be imputed to the defendant for purposes of establishing that it carried on commercial activity in the United States. In addition, the sale created "substantial contact" with the United States. The en banc court also held that the plaintiff's claims, which arose from a fall when she attempted to board a train in Austria, were "based upon" the defendant's commercial activity in the United States because the plaintiff showed a nexus between her claims and the sale of the Eurail pass. The en banc

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

court held, therefore, that the FSIA's commercial-activity exception applied.

Dissenting, Judge O'Scannlain, joined by Chief Judge Kozinski and Judge Rawlinson, wrote that the commercial-activity exception did not apply because the sale of the Eurail pass was not attributable to the defendant, and so the plaintiff failed to allege commercial activity "by the foreign state."

Dissenting, Chief Judge Kozinski agreed with Judge O'Scannlain that a foreign sovereign does not engage in commercial activity in the United States when a subagent over which it exercises no direct control sells tickets for passage on a common carrier wholly owned by that sovereign. Chief Judge Kozinski wrote that he would affirm the district court on the ground that the plaintiff's claim arose from events that transpired entirely in Austria, and thus was not "based upon" commercial activity carried on in the United States.

COUNSEL

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Juan C. Basombrio, Dorsey & Whitney LLP, Irvine, California, for Defendant-Appellee.

OPINION

GOULD, Circuit Judge:

We must decide whether a resident of the United States has a domestic forum in which to bring a claim against a foreign common carrier, operated by a foreign sovereign entity, that sells tickets through a third-party agent or subagent in the United States. Carol P. Sachs filed a complaint against OBB Personenverkehr AG (OBB) in the United States District Court for the Northern District of California. Sachs sought damages for traumatic injuries that she sustained while trying to board an OBB train in Innsbruck, Austria.

The district court granted OBB's motion to dismiss for lack of subject-matter jurisdiction, concluding that OBB, as an instrumentality of the Republic of Austria, was immune from suit under the Foreign Sovereign Immunities Act of 1976 (FSIA). On appeal, Sachs argues that under the first clause of the FSIA's commercial-activity exception, the district court has subject-matter jurisdiction over her claims. We agree. A foreign-state owned common carrier, such as a railway or airline, engages in commercial activity in the United States when it sells tickets in the United States through a travel agent regardless of whether the travel agent is a direct agent or subagent of the common carrier. Under the FSIA, federal courts of the United States will have subject-matter jurisdiction over actions against a foreign sovereign common carrier that engages in commercial activity of this

kind as long as the plaintiff's claims are based upon that activity.

I

OBB Personenverkehr AG is a separate legal entity wholly owned by OBB Holding Group, a joint-stock company created by the Republic of Austria. OBB Holding Group is wholly owned by the Austrian Federal Ministry of Transport, Innovation, and Technology. OBB's main function is to operate passenger rail service within Austria. Like many of its counterparts in other European countries, OBB is a member of the Eurail Group, which is an association organized under Luxemburg law. According to OBB, Eurail Group is responsible for marketing and selling rail passes. Eurail passes are marketed to non-European residents, as they cannot be used by residents of Europe and nearby countries.

In early March 2007, Sachs purchased a four-day Eurail pass from the Rail Pass Experts (RPE) for travel in Austria and the Czech Republic. RPE is located in Massachusetts, but Sachs bought the Eurail pass online through the RPE website. Sachs's Eurail pass listed various disclaimers, including that "the issuing office is merely the intermediary of the carriers in Europe and assumes no liability resulting from the transport." The Eurail pass also stated that it is "non-transferable and only valid upon presentation of a passport or a valid travel document replacing the passport."

In late April 2007, Sachs arrived in Innsbruck, Austria, and presented her Eurail pass to OBB to purchase a couchette reservation for her trip from Innsbruck to Prague. Although Sachs would have been able to board the train to sit in an unassigned seat with the Eurail pass that she bought from RPE, she paid the €30.90 fee to upgrade her pass and reserve a couchette bed. The Eurail pass required customers to pay separately for upgrades of this kind.

When Sachs tried to board the train, she fell between the tracks. Her legs were crushed by the moving train. As a result of these injuries, both of Sachs's legs were amputated above the knee. Sachs alleges that OBB caused her injuries by negligently moving the train while she attempted to board. OBB disputes this allegation, claiming that the train was already moving when Sachs tried to board.

Sachs filed suit against OBB in the United States District Court for the Northern District of California.[1] Her complaint asserts claims for negligence; strict liability for a design defect; strict liability for failure to warn about a design defect; breach of implied warranty of merchantability; and breach of implied warranty of fitness. To support these claims, Sachs alleges (a) that she purchased the Eurail pass

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[1] Sachs's complaint also named the Republic of Austria and the OBB Holding Group as defendants. The Republic of Austria was dismissed from the lawsuit when Sachs did not oppose the Republic of Austria's motion to dismiss. OBB Holding Group was not properly served and is not a party to this litigation.

through OBB's agent Eurail and the American-based company RPE; (b) that through the Eurail pass OBB agreed to provide railway transportation to Sachs during her April 2007 visit to Austria; and (c) that OBB, as a common carrier, owed her a duty of "utmost care."

OBB filed a motion to dismiss on June 21, 2010, arguing that it was entitled to sovereign immunity under the FSIA. In the alternative, OBB also argued that Sachs's complaint should be dismissed for *forum non conveniens,* lack of personal jurisdiction, and international comity. After a hearing and supplemental briefing on the motion, the district court granted OBB's motion to dismiss for lack of subject-matter jurisdiction on foreign-sovereign-immunity grounds. *Sachs v. Republic of Austria,* No. C 08-1840 VRW, 2011 WL 816854, at *4 (N.D. Cal. Jan. 28, 2011) (unpublished). The district court concluded that Sachs had not shown a connection between OBB and RPE sufficient to create a principal-agent relationship. As a result, the district court found that RPE's commercial activity in the United States could not be imputed to OBB. Sachs timely appealed.

A divided three judge panel of this court affirmed. *Sachs v. Republic of Austria,* 695 F.3d 1021, 1029 (9th Cir. 2012). The majority of judges agreed on result but not reasoning. Relying on our previous decision in *Doe v. Holy See,* 557 F.3d 1066 (9th Cir. 2009) (per curiam), the majority opinion concluded that RPE's sale of the Eurail pass could not be imputed to OBB for purposes of establishing jurisdiction

under the FSIA's commercial-activity exception. *Sachs*, 695 F.3d at 1025-26. The concurrence agreed that the district court properly dismissed the case for lack of subject-matter jurisdiction, but it argued that *Holy See* was inapposite because that case addressed a different exception under the FSIA. Instead, the concurrence argued that Sachs's claim failed under *Sun v. Taiwan*, 201 F.3d 1105 (9th Cir. 2000), because Sachs did not allege facts sufficient to show that her claims were "based upon" the sale of the Eurail pass in the United States. *Sachs*, 695 F.3d at 1029-30 (quoting 28 U.S.C. § 1605(a)(2)). The dissent explained that both *Holy See* and *Sun* were distinguishable from Sachs's case and that the plain language of the FSIA permits jurisdiction over OBB. *Id.* at 1032-33.

We ordered rehearing en banc to clarify whether the first clause of the FSIA commercial-activity exception applies to a foreign sovereign when a person purchases a ticket in the United States from a travel agency for passage on a commercial common carrier owned by that foreign state.

II

We review *de novo* the district court's determination of immunity under the FSIA. *Embassy of the Arab Republic of Egypt v. Lasheen*, 603 F.3d 1166, 1170 (9th Cir. 2010). A defendant asserting foreign sovereign immunity "may make either a facial or factual challenge to the district court's subject matter

jurisdiction." *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012), *cert. denied*, 2013 WL 1723794 (U.S. Oct. 7, 2013) (No. 12-1261). A facial challenge argues only that the facts as alleged in the complaint are insufficient to state a claim. *Id.* A factual challenge disputes the truth of the allegations that would otherwise be sufficient to invoke federal jurisdiction. *Id.*

OBB's challenge is factual. OBB submitted documentary evidence and a declaration to prove OBB's status as an agency or instrumentality of the Austrian government and to dispute the truth of Sachs's allegations that RPE sold the ticket as an authorized agent of OBB. Sachs submitted her own declaration and evidence to support her claim of jurisdiction under the FSIA's commercial-activity exception. When the district court relies on such evidence for its decision, we generally treat the jurisdictional attack as factual. *See Holy See*, 557 F.3d at 1073. For such a factual challenge, we must determine (1) whether Sachs has carried her burden to prove, by offering evidence, that the commercial-activity exception to foreign sovereign immunities applies and (2) whether OBB has carried its burden to prove, by showing a preponderance of evidence, that the exception is not applicable. *See Terenkian*, 694 F.3d at 1131-32.

III

The doctrine of foreign sovereign immunity has its roots in the common law, tracing back to the Supreme Court's decision in *Schooner Exchange v. McFaddon,* 11 U.S. 116 (1812), which extended "virtually absolute immunity to foreign sovereigns as 'a matter of grace and comity.'" *Samantar v. Yousuf,* 560 U.S. 305, 311 (2010) (quoting *Verlinden B.V. v. Cent. Bank of Nigeria,* 461 U.S. 480, 486 (1983)). After *Schooner Exchange,* federal courts routinely deferred to the State Department on whether to assume jurisdiction over an action against a foreign sovereign or its instrumentality. *Republic of Austria v. Altmann,* 541 U.S. 677, 689 (2004).[2] In 1952, the State Department adopted a "restrictive" theory of sovereign immunity. *Samantar,* 560 U.S. at 312. The restrictive theory of sovereign immunity recognizes that sovereigns are immune "with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." *Altmann,* 541 U.S. at 690 (internal quotation marks omitted). This shift was based on the philosophy that where foreign sovereigns engage in commercial dealings there is "a much smaller risk of affronting their sovereignty."

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[2] Under this practice, the State Department would usually file a suggestion of immunity in the court at the request of the foreign state and the district court would grant immunity on that basis. *Peterson v. Islamic Republic of Iran,* 627 F.3d 1117, 1126 (9th Cir. 2010). In the absence of suggestion from the State Department, the district court would determine jurisdiction based on the established policy of the State Department. *Id.*

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 703 (1976) (plurality).

In 1976, Congress codified the State Department's restrictive theory of sovereign immunity in the FSIA, which established a comprehensive "set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities" and shifted the primary responsibility for determining immunity to the federal courts. *Altmann*, 541 U.S. at 691 (quoting *Verlinden B.V.*, 461 U.S. at 488). The FSIA establishes a presumption of immunity for foreign states but carves out specified exceptions to that grant of immunity. *Id.* The FSIA exceptions are "the sole basis for obtaining jurisdiction over a foreign state in [U.S.] courts." *Peterson*, 627 F.3d at 1122 (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)).

The exception relevant to this appeal is the first clause of the commercial-activity provision, which provides that a foreign state is amenable to suit where the plaintiff's action is "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2).[3] This clause has

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[3] "Courts have construed this commercial activity provision to have three independent clauses, and have used different criteria for each of the three separate clauses to assess a claimed exception." *Terenkian*, 694 F.3d at 1127. We review only the first of these clauses here, and we use the term "commercial-activity exception" to refer only to that clause.

two parts: (1) the foreign sovereign must have carried on commercial activity within the United States; and (2) the claim must be based upon that activity.

As for the first part, commercial activity occurs when a foreign state acts as a private player within the market or exercises powers that can also be exercised by private citizens. *Terenkian,* 694 F.3d at 1132. Commercial activity can be "either a regular course of commercial conduct or a particular commercial transaction or act." *Id.* (quoting 28 U.S.C. § 1603(d)). "In determining whether an act or activity is commercial, we must look to its nature, not its purpose." *Siderman de Blake v. Republic of Arg.,* 965 F.2d 699, 708 (9th Cir. 1992). To be "'carried on in the United States'" there must be "substantial contact" between the commercial act and this country. *Terenkian,* 694 F.3d at 1132 (quoting 28 U.S.C. § 1603(e)).

As for the second part, "based upon" means "those elements of a claim that, if proven, would entitle a plaintiff to relief." *Id.* (quoting *Saudi Arabia v. Nelson,* 507 U.S. 349, 357 (1993)). That is, the commercial activity that occurs within the United States must be connected with the conduct that gives rise to the plaintiff's cause of action. *Id.* at 1132-33; *see also Am. W. Airlines, Inc., v. GPA Grp. Ltd.,* 877 F.2d 793, 796 (9th Cir. 1989).

IV

Two main issues are raised on appeal: (1) whether the sale of the Eurail pass, as the underlying commercial activity,[4] can be imputed to OBB for purposes of establishing that OBB carried on commercial activity in the United States; and, if so, (2) whether Sachs's claims are "based upon" that commercial activity as required by the commercial-activity exception. The parties agree that OBB is an agency or instrumentality of the Republic of Austria and that it qualifies as a foreign state for purposes of the FSIA. They also agree that the sale of a Eurail pass constitutes a commercial activity under the FSIA. We must first determine if there is a relationship between OBB and RPE sufficient to impute RPE's commercial act within the United States to OBB. If we conclude such a relationship exists, then we must determine if there is a nexus between Sachs's claims and the underlying commercial activity sufficient to show that the claims of Sachs are "based upon" the commercial activity.

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[4] The district court concluded, based on the agreement of the parties, that "the only relevant commercial activity within the United States was plaintiff's March 2007 purchase of a Eurail pass from the Rail Pass Experts." We consider only the relevant conduct as defined by the district court. *See Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 781 (9th Cir. 1991) (accepting the district court's definition of relevant conduct when not clearly erroneous).

A

The first clause of the commercial-activity exception gives United States courts subject-matter jurisdiction over any case against a foreign state or its instrumentality "in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). To apply this exception to Sachs's claims against OBB, there must be a sufficient connection between OBB and RPE's sale of a Eurail pass within the United States to support the conclusion that OBB "carried on" commercial activity within the United States. *Id.* We conclude that there is.

The plain text of the FSIA indicates that the first clause of the commercial-activity exception encompasses situations in which a foreign state carries on commerce through the acts of an independent agent in the United States. The FSIA defines "commercial activity carried on in the United States by a foreign state" as "commercial activity carried on by such state and having substantial contact with the United States." *Id.* § 1603(e). This definition requires two elements to establish that a foreign state carried on commercial activity in the United States: (1) that the foreign state carries on commercial activity and (2) that commercial activity has "substantial contact" with the United States. *See Nelson*, 507 U.S. at 356 (establishing that jurisdiction requires a plaintiff's action to be "'based upon' some 'commercial activity' by [a foreign state] that had 'substantial contact' with the United States").

I

The FSIA's legislative history shows that Congress intended the commercial-activity exception to be read broadly to "include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a 'substantial contact' with the United States." H.R. Rep. No. 94-1487, at 17 (1976). Notably, neither the statute nor the legislative history defines how the commercial activity within the United States must be "carried on" but both suggest that "the 'carried on by' requirement can be interpreted in light of broad agency principles." *Mar. Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1105 (D.C. Cir. 1983). Under traditional agency principles, the foreign state may engage in commerce in the United States indirectly by acting through its agents or subagents. *See Phaneuf v. Republic of Indon.*, 106 F.3d 302, 307-08 (9th Cir. 1997) (establishing that a foreign state can conduct commercial activity through its agents). As long as the agent or subagent acts with actual authority, those acts can be imputed to the foreign state. *Id.*

The Second Circuit and the D.C. Circuit have both applied this principle of imputing the acts of a subagent to a foreign state under the first clause of the commercial-activity exception.[5] Both have applied

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[5] The dissent of Judge O'Scannlain virtually ignores (and the dissent of Chief Judge Kozinski entirely ignores) the two cases that are most like this one, *Kirkham v. Société Air France*,

(Continued on following page)

429 F.3d 288, 290, 293 (D.C. Cir. 2005), and *Barkanic v. General Administration of Civil Aviation of the Peoples Republic of China*, 822 F.2d 11 (2d Cir. 1987), by arguing that those considered decisions of the D.C. Circuit in *Kirkham* and the Second Circuit in *Barkanic* "do not analyze when the acts of agents can be attributed to a foreign state." Judge O'Scannlain Dissent at 49. We agree that the issue was not explicitly raised in those opinions, as noted in the dissent on the three-judge panel, but we do not agree with the argument by the dissent of Judge O'Scannlain on this en banc panel aimed at discrediting the force of these cases for us. Further, the dissent of Judge O'Scannlain does not acknowledge that its view, if adopted, would create a circuit split with those decisions of the D.C. Circuit and Second Circuit. At the time our prior three-judge panel had decided this case, the jurisdictional argument on which the dissent of Judge O'Scannlain relies had not even been raised by the Republic of Austria in its briefing or in its oral argument. Because the issue is jurisdictional, we have considered the Republic of Austria's new contentions about agency even though they were not previously presented. *Infra* note 7. Whether or not in *Barkanic* the government of the People's Republic of China conceded agency from the sale of its ticket by a travel agent in the United States, and whether or not in *Kirkham* the government of France conceded agency from the sale of its ticket by a travel agent in the United States, is beside the point. Because the issue is jurisdictional, these other circuits, like us, had an independent duty to assess jurisdiction. If the sale by the travel agent was not sufficient for jurisdictional purposes, then the district courts would have been without jurisdiction and the circuit courts should not have proceeded to render decision accepting that the district courts had jurisdiction over the foreign common carriers by virtue of the commercial-activity exception, and the sale in the United States by the travel agency. Thus the position of the dissent of Judge O'Scannlain creates a conflict with the two other United States Courts of Appeals that have considered parallel cases where a travel agent in the United States sold a ticket for passage on a common carrier owned by a foreign government. We do not disagree that there could be "many instances in which Americans

(Continued on following page)

the commercial-activity exception where the commercial act in the United States was that of a travel agent acting for the foreign sovereign. In *Barkanic v. General Administration of Civil Aviation of the Peoples Republic of China* (CAAC), the Second Circuit concluded that the first clause of the commercial-activity exception applied to the Chinese airline CAAC based on the sale of a plane ticket in the United States by a third-party agent. 822 F.2d 11, 13 (2d Cir. 1987). CAAC had entered into an agreement with Pan American World Airways whereby Pan American would act as a general sales agent for CAAC in the United States. *Id.* at 12. The tickets in question were not purchased directly through Pan American but through Pan American's agent, Vanslycke & Reeside Travel, Inc. *Id.* Similarly, in *Kirkham v. Société Air France,* the D.C. Circuit applied the commercial-activity exception to a suit against Air France which was based on the sale of airline tickets through a D.C. travel agency for travel in France. 429 F.3d 288, 290, 293 (D.C. Cir. 2005).

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who wish to sue foreign sovereigns can only do so overseas," Judge O'Scannlain Dissent at 50, but there is no reason to think that Congress intended that result when a foreign common carrier sells tickets targeting Americans through agents in the United States. The dissent of Judge O'Scannlain notes that the general rule requiring suit of foreign sovereigns only overseas is a result Congress intended "in many instances," *id.,* but the dissent of Judge O'Scannlain fails to give credence to the plain meaning of the language Congress inserted excepting the situation when the foreign sovereign has engaged in commercial activity in the United States from which a claim springs.

Because Congress passed the FSIA to promote uniformity in the treatment of foreign sovereign immunity, and because we think that Congress intended to permit suit in the United States against foreign sovereign common carriers that sell tickets in the United States through agents, we see no compelling reason to create a split with our sister circuits. *See Kelton Arms Condo. Owners Ass'n. v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003) (When a law is "best applied uniformly, we decline to create a circuit split unless there is a compelling reason to do so.").

Sachs's claim is no different in substance, for purposes of assessing sovereign immunity, from those analyzed by our sister circuits. Like the travel agents in *Kirkham* and *Barkanic,* RPE is a subagent of OBB through Eurail Group. Under traditional theories of agency, RPE's act of selling the Eurail pass to Sachs within the United States can be imputed to OBB as the principal. Where a common carrier authorizes a travel intermediary to "issue tickets on its behalf and to collect and hold customer payment, the intermediary acts as the [carrier's] agent." Restatement (Third) of Agency § 3.14 cmt. c (2006). Here, Eurail Group markets and sells rail passes for transportation on OBB's rail lines, making Eurail Group an agent of OBB. Eurail Group enlists subagents, like RPE, to sell and market its passes worldwide. Eurail Group's use of these subagents establishes a legal relationship between OBB (the principal) and RPE (the subagent): "As to third parties, an action taken by a

subagent carries the legal consequences for the principal that would follow were the action instead taken by the appointing agent." Restatement (Third) of Agency § 3.15 cmt. d (2006). OBB admits as much in describing the relationship between OBB and RPE: "you have the operator, you have a separate legal entity, then you have a marketing arm, then you have a general agent."

OBB argues that even if an agency relationship exists between it and RPE, RPE still lacked actual authority to sell the Eurail pass. We disagree. RPE's authority to sell the Eurail pass derives from the original authority that OBB granted to Eurail Group to market and sell passes for transportation on its rail lines. Indeed, Andreas Fuchs, a member of the Board of Management of OBB, conceded in his declaration that this Eurail pass entitled Sachs to board the train in Innsbruck. Moreover, RPE's actual authority to sell the Eurail pass can be inferred from OBB's sale of the couchette bed upgrade to Sachs. Sachs could purchase the couchette upgrade only if she had a valid Eurail pass. Otherwise, she would have been required to purchase an entirely new ticket, not just an upgrade. If RPE had impermissibly sold the Eurail pass to Sachs, OBB would have had no duty to honor the pass. But it did. It cannot now sensibly argue that the sale of that pass by RPE in the United States was unauthorized.[6] Because we

[6] We also agree with Sachs that even if we were to conclude that the sale was originally unauthorized, this ratification of the

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conclude RPE acted as an authorized agent of OBB, we impute RPE's sale of the Eurail pass in the United States to OBB. *See Phaneuf,* 106 F.3d at 307-08 ("[A]n agent's deed which is based on the actual authority of the foreign state constitutes activity 'of the foreign state.'") (quoting 28 U.S.C. § 1605(a)(2)).

Our case law is not to the contrary. In *Holy See*, we considered what acts performed by the Holy See's domestic corporations could be attributed to the Holy See for purposes of the non-commercial torts exception under 28 U.S.C. § 1605(a)(5). *Holy See,* 557 F.3d at 1076-78. In that context, we found it appropriate to adopt the standard articulated by the Supreme Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611 (1983). *Id.* Drawing on common-law corporate principles, the Supreme Court in *Bancec* adopted and applied a presumption of separate juridical status that can be overcome only when (1) "'a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created,'" or (2) "when recognizing the separate status of a corporation 'would work fraud or injustice.'" *Holy See,* 557 F.3d at 1077-78 (quoting *Bancec,* 462 U.S. at 629).

Both *Bancec* and *Holy See* are distinguishable because they determined agency in the context of assessing responsibility of corporate affiliates. In

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pass by OBB gives it the "effect as if originally authorized." *Rayonier, Inc. v. Polson,* 400 F.2d 909, 915 (9th Cir. 1968).

contrast, Sachs's allegations are not based on a corporate relationship between OBB and RPE, but rather on principles of agency. Unlike Cuba and its official bank, Bancec, or the Holy See and its domestic corporations, OBB and RPE are "entirely distinct" entities. *See Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 535 (5th Cir. 1992). "There is neither common ownership nor any similar legal relationship between these entities." *Id.* Thus *Bancec*'s definition of agency for purposes of piercing the corporate veil is inapposite – "[o]ne cannot pierce a non-existent corporate veil." *Id.* The day-to-day control inquiry under *Bancec* makes no sense here where the question is "whether a particular type of agency relationship is sufficient under the commercial activity exception." *Dale v. Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006) (distinguishing *Bancec* from the inquiry of whether an individual agent had authority to bind the foreign state); *see also Phaneuf*, 106 F.3d at 307 n.3 (distinguishing the "alter ego" analysis).

OBB contends that common-law principles of agency are inapplicable under the plain language of the FSIA unless the purported agent first meets the statutory definition of "agency or instrumentality of a foreign state" under § 1603(b).[7] Section 1603(b)

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[7] OBB did not initially brief this argument before our court. We do not consider it waived, however, because it goes to our independent duty to determine subject-matter jurisdiction. *See Lasheen*, 603 F.3d at 1171 n.3 ("[C]hallenges to subject-matter jurisdiction cannot be waived. . . ."). Also, after oral argument we ordered supplemental briefing on this issue.

defines an "agency or instrumentality of a foreign state" as any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State or of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). OBB argues that this definition of agency applies throughout the FSIA to limit who could be considered an agent of a foreign state. Under this theory, the court can consider common-law definitions of agency only after the statutory definition of agency is met. OBB contends that because RPE cannot meet the definition of agency under § 1603(b), RPE's sale of the Eurail pass cannot be imputed to OBB and no jurisdiction exists under the FSIA. We reject this contention.

The plain text of the FSIA does not support OBB's proposed framework for determining whether RPE is an agent of OBB. Section 1603(b) defines what type of entity can be considered a foreign state for purposes of claiming sovereign immunity. If an entity cannot show that it meets that definition then it is not entitled to sovereign immunity. Whether an

entity meets the definition of an "agency or instrumentality of a foreign state" to claim immunity is a "completely different question" from whether the acts of an agent can be imputed to a foreign state for the purpose of applying the commercial-activity exception. *Gates v. Victor Fine Foods,* 54 F.3d 1457, 1460 n.1 (9th Cir. 1995) (quoting *Hester Int'l Corp. v. Fed. Republic of Nigeria,* 879 F.2d 170, 176 n.5 (5th Cir. 1989)).

Common sense also tells us that an agent that carries on commercial activity for a foreign sovereign in the United States does not need to be an agency or instrumentality of a foreign state under § 1603(b). Foreign sovereigns invariably must act through agents, and if they engage in commercial activity in the United States it will necessarily be through an agent, whether that agent is its own employee or a separate company in an agency or subagency relationship.

Further, it is a well-established canon of statutory interpretation that "when a statute covers an issue previously governed by the common law, we interpret the statute with the presumption that Congress intended to retain the substance of the common law." *Samantar,* 560 U.S. at 320 n.13. To abrogate common-law principles of agency, the FSIA "must speak directly to the question addressed by the common law." *United States v. Bestfoods,* 524 U.S. 51, 63 (1998) (quoting *United States v. Texas,* 507 U.S. 529, 534 (1993)). Because the FSIA codified our common law of sovereign immunity, *Samantar,* 560 U.S. at 311, we

begin with the presumption that the statute maintains common-law principles. That Congress defined the term "agency or instrumentality of a foreign state" does not convince us that Congress intended to displace common-law agency principles under the statute for purposes of assessing commercial activity within the United States.

OBB asks us to read this definition to apply not only to the phrasal term "agency or instrumentality of a foreign state" but also to the individual terms "agency" and "agent." OBB's advocated reading strains the plain language of the FSIA, renders the bulk of the phrase superfluous, and ignores that § 1603(b) defines a singular phrasal term wherein all words are important. Each word within the defined term does not hold the same meaning individually that it has when placed alongside the other terms in the defined phrase. The three elements listed in § 1603(b) define only what constitutes an "agency or instrumentality of a foreign state." *See Samantar*, 560 U.S. at 314 (describing this as a single term). They do not give meaning to the word "agency" or "agent" if used alone. If we were to adopt OBB's preferred reading, then § 1605A's references to an "agent" of a foreign state "acting within the scope of his or her agency" becomes illogical. We will not "construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-77 (2003).

The position that OBB advances would negate the possibility of commercial activity by a state-owned railway or airline within the United States through a travel agent. We cannot believe that this is what Congress intended. Throughout the world many foreign states own and operate legally independent passenger railways and airlines, which may qualify for sovereign immunity as an "agency or instrumentality of a foreign state" under 28 U.S.C. § 1603(b).[8] Foreign states are also heavily involved in the airline industry.[9] Given the prevalence of these rail lines and

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[8] For instance, Canada, India, Israel, Korea, and Thailand each provides passenger services through state-owned railways. *See* Via Rail Canada, Inc., http://www.viarail.ca/en/about-via-rail (last visited November 15, 2013); Indian Railways, http://www.indianrailways.gov.in/# (last visited November 15, 2013); Israel Railways, http://www.rail.co.il/EN/About/Pages/about.aspx (last visited November 15, 2013); Korail Korean Railroad, http://www.korail.com/en/ (last visited November 15, 2013); State Railway of Thailand, http://www.railway.co.th/home/srt/about/history.asp?lenguage=Eng (last visited November 15, 2013).

[9] According to an unofficial 2008 compilation by the United Nations's International Civil Aviation Organization the following airlines, and many others, are 51 to 100 percent government owned: Aeroflot Russian Airlines, Air Botswana, Air Burundi, Air China, Air India, Air Jamaica, Air Madagascar, Air Malawi, Air Tanzania, Air Zimbabwe, Bahamasair, Belavia Belarusian Airlines, Bulgaria Air, Cameroon Airlines, Cayman Airways, Croatia Airlines, CSA Czech Airlines, Cubana de Aviación, Druk Air (Royal Bhutan Airlines), Egyptair, Emirates Airlines, Eritrean Airlines, Ethiopian Airlines, Finnair, Garuda Indonesia, Ghana International Airlines, Lao Airlines, Libyan Arab Airlines, LOT Polish Airlines, Malaysia Airlines, Myanma Airways (Myanmar), Orbi Georgian Airways, Pakistan International Airlines, Polynesian Airlines (Samoa), Royal Nepal

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airlines worldwide,[10] we believe that Congress contemplated that the sale of tickets by travel agents within the United States for passage on foreign-sovereign owned common carriers would constitute

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Airlines, Rwanda Air Express, Saudi Arabian Airlines, Singapore Airlines, South African Airways, TAP Portugal, and Vietnam Airlines. List of Government-owned and Privatized Airlines (unofficial preliminary compilation), Int'l Civil Aviation Org., (July 4, 2008), *available at* http://www.icao.int/sustainability/Documents/PrivatizedAirlines.pdf.

[10] We observe the existence of these foreign-state owned railways and airlines as legislative, rather than adjudicative, facts because of their relevance to our "legal reasoning" and interpretation of the "lawmaking process." Fed. R. Evid. 201(a), advisory note to 1972 amendments; *see also* Kenneth Culp Davis, *Judicial Notice,* 55 Colum. L. Rev. 945, 952 (1955) (explaining that a court may "resort to legislative facts, whether or not those facts have been developed on the record"). Even if we were to view the existence of state-owned railroads and airlines as adjudicative facts, it would still be correct to recognize their existence as a matter of judicial notice. We may take judicial notice of an adjudicative fact "that is not subject to reasonable dispute" because it is either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). There might be dispute about whether any particular airline or railroad is state owned. Ownership may have changed; government carriers may have been privatized. There might also be a problem of where to draw the line on percentage of ownership required for the presumption of immunity. But whatever the detail as to particular carriers, it cannot reasonably be disputed that there are many national airlines and railroads worldwide that may market and sell tickets through agents or subagents in the United States. The existence of a state-owned carrier can be shown by reference to government websites and papers of the governments and reviewing agencies.

"commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2).

Adopting the OBB position would mean that scores of state-owned railroads and airlines worldwide could sell their tickets for foreign travel through travel agents in the United States and then claim sovereign immunity thereafter because the travel agents selling their tickets do not meet the definition of a state instrumentality under § 1603(b). Such immunity would extend not only to torts but to contract liability stemming from the actions of their common law agents in the United States. That result would mean that American citizens who buy tickets through authorized domestic agents on airlines or railroads owned by foreign governmental entities could find their reservations not honored and their payments retained. The only recourse against the contract-breaching carrier would be to sue abroad, even though the contract was entered into in the United States. There is no reason to think Congress intended such a chaotic result.

We likewise find no support for OBB's suggested interpretation in the FSIA's legislative history. OBB contends that the legislative history confirms its interpretation because it says that the term "foreign state" applies consistently throughout the FSIA. According to OBB, because the term "foreign state"

has a consistent definition throughout the statute,[11] "the definition of an 'agency' in Subsection 1603(b) limits who is an agent for purposes of Section 1605(a)(2)." We do not see the connection. That Congress intended the terms defined in § 1603 to apply consistently throughout the FSIA does not mean that Congress intended for those defined terms to displace principles of common law. Indeed, the Supreme Court has looked to common-law corporate principles to determine the proper interpretation of § 1603(b). *See Dole Food Co.*, 538 U.S. at 474 (relying on a "basic tenet of American corporate law" to hold that "only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement" under § 1603(b)); *see also Samantar*, 560 U.S. at 320 (examining "relevant common law and international practice" to interpret the FSIA).[12]

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[11] Section 1608 employs a different definition of "foreign state." *See* 28 U.S.C. § 1603(a).

[12] In addition to asking us first to adopt what we think is a strained reading of the statute, OBB asks us next to preserve the *Bancec* presumption of separate juridical status to be applied after we determine agency under § 1603(b). That is, OBB argues that the definition of "agency" under § 1603(b) did not fully abrogate common-law principles of agency but preserved the common law as a second requirement for establishing agency. Under that analysis, we would first determine whether an entity met the elements enumerated in § 1603(b) and, if so, we would determine whether that entity met *Bancec*'s standard for overcoming the presumption of separate juridical status.

This analytical framework is untenable. We know of no principle of statutory construction, and OBB cites to none, that

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Moreover, none of the cases relied on by OBB applied this strained reading of the FSIA. The main case on which OBB relies is the Supreme Court's decision in *Samantar,* which held that individual officials are not included within the meaning of "agency or instrumentality of a foreign state." 560 U.S. at 316. OBB points to a passage in the opinion that states that § 1603(b) "specifically delimits what counts as an 'agency or instrumentality.'" *Id.* at 314 (quoting 28 U.S.C. § 1603(b)). That is true, but *Samantar* makes this statement while interpreting what or who constitutes a foreign state under the meaning of § 1603(b). *Id.* at 314-16. That is the opposite question from the one we are presented with here. The other cases cited by OBB are equally unavailing and either do not address the issue or support a statutory construction contrary to that proposed by OBB. *See, e.g., Gates,* 54 F.3d at 1460 n.1 (distinguishing the analysis for determining whether a defendant is an agent or instrumentality of a foreign state from the analysis for determining whether to impute the acts of an agency to the government). OBB has not convinced us that its reading of the

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supports reading a statute to create a hierarchical system that first requires application of a statutory definition and then allows consideration of the common-law definition for the same term. It seems that OBB would like to construct a gantlet through which no claimant could run, a barrier no claimant could surmount. The plain language of the FSIA does not support such a framework, as explained above.

FSIA is proper.[13] We conclude that RPE's sale of the Eurail pass in the United States can be imputed to OBB.

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[13] The dissent of Judge O'Scannlain cites the "Presumption of Consistent Usage" canon, which stands for the proposition that a "word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012). In the statute, there are different phrasings of "agency or instrumentality of a foreign state", 28 U.S.C. § 1603(b), and "agent of that foreign state . . . acting within the scope of his or her . . . agency," *id.* § 1605A(c), and the commercial-activity exception, *id.* § 1605(a)(2), which does not include the word "agency." We do not have text from one part of the statute interpreted differently from the same text in another part of the statute. While not applying correctly the maxim of consistent usage, the dissent of Judge O'Scannlain also ignores other statutory construction principles pointing in the direction that an "agent" for purposes of satisfying the commercial-activity exception is not the same as an "agency or instrumentality of a foreign state" for purposes of invoking sovereign immunity. Some of these other principles are: the surplusage canon ("every word and every provision is to be given effect"), the harmonious reading canon ("the provisions of a text should be interpreted in a way that renders them compatible, not contradictory"), the associated words canon ("associated words bear on one another's meaning (*noscitur a sociis*)"), and the prior construction canon ("If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort . . they are to be understood according to that construction"). *See* SCALIA & GARNER, 174, 181, 195, 322. All of these canons suggest that "agency or instrumentality of a foreign state" must be interpreted as an entire phrase, and that the definitions within § 1603(b) do not supplant or implicate the common law definition of agency which can be taken into account in assessing § 1605(a)(2).

Although imputing the sale of the pass by RPE to OBB is essential to showing that the "commercial activity was carried on in the United States," we must still determine if that sale creates "substantial contact" with the United States. 28 U.S.C. § 1603(e). We conclude that it does.

"Substantial contact" is not clearly defined in the FSIA or by our circuit or our sister circuits. *See Shapiro v. Republic of Bol.*, 930 F.2d 1013, 1019 (2d Cir. 1991). It is generally agreed that it sets a higher standard for contact than the minimum contacts standard for due process. *See id.*; *Mar. Int'l Nominees Establishment*, 693 F.2d at 1109 (explaining that the substantial contact requirement makes "clear that the immunity determination under the first clause diverges from the 'minimum contacts' due process inquiry"). Under this standard, we have concluded that merely executing contracts for the sale of crude oil in the United States, by itself, is not a substantial contact. *Terenkian*, 694 F.3d at 1137. In *Terenkian*, we found relevant that no activity related to the formation of the contracts other than that their execution occurred within the United States. *Id.* at 1126, 1137. In a different context, we have concluded that there was substantial contact where a foreign state, through its agent in the United States, advertised to and solicited customers in the United States, causing numerous Americans to stay in the foreign state's hotel. *Siderman de Blake*, 965 F.2d at 709. Although in some situations the formation of a contract within

the United States may not be sufficient to establish substantial contact, in other situations the advertisement to and solicitation of customers in the United States is enough. The context of the commercial activity helps to determine whether the substantial-contact requirement is met.

In the common-carrier context, we also look to factors such as the marketing, selling, and arranging of foreign travel in the United States to determine whether substantial contact exists. *See Schoenberg,* 930 F.2d at 781-82 (concluding that substantial contact exists where the trip was arranged and started in California); *see also Santos v. Compagnie Nationale Air Fr.,* 934 F.2d 890, 894 (7th Cir. 1991) (cataloguing cases); *Sugarman v. Aeromexico, Inc.,* 626 F.2d 270, 272-73 (3d Cir. 1980). Where a ticket for travel on a foreign common carrier is bought and paid for in the United States, we conclude that the substantial contact requirement is satisfied. *See Barkanic,* 822 F.2d at 14. The sale and marketing of Eurail passes within the United States is sufficient to meet the substantial-contact element and to show that OBB carried on commercial activity in the United States. It remains for us to determine whether the claims of Sachs are "based upon" this commercial activity.

B

"[T]he phrase 'based upon' in § 1605(a)(2) 'is read most naturally to mean those elements of a claim

that, if proven, would entitle a plaintiff to relief under [his or her] theory of the case.'" *Lasheen*, 603 F.3d at 1170-71 (quoting *Nelson*, 507 U.S. at 357); *see also Santos*, 934 F.2d at 893 ("An action is based upon the elements that prove the claim, no more and no less."). The "based upon" language demands "more than a mere connection with, or relation to, commercial activity." *Nelson*, 507 U.S. at 358. But it is not necessary that the entire claim be based upon the commercial activity of OBB. Sachs's claims will be "based upon" the commercial activity if "*an element* of [her] claim consists in conduct that occurred in commercial activity carried on in the United States." *Sun*, 201 F.3d at 1109 (quoting *Sugimoto v. Exportadora De Sal*, 19 F.3d 1309, 1311 (9th Cir. 1994)); *see also Terenkian*, 694 F.3d at 1132.

To establish that her action is "based upon" OBB's commercial activity, Sachs must show a nexus between her claims and the sale of the Eurail pass. *See Sun*, 201 F.3d at 1109. We look to Sachs's theory of the case to determine if she meets this burden. *See id.* at 1110; *see also Nelson*, 507 U.S. at 357 (considering Nelson's theory of the case to determine jurisdiction). Sachs's complaint asserts five claims for relief: negligence; strict liability for a design defect; strict liability for failure to warn for a design defect; breach of implied warranty of merchantability; and breach of implied warranty of fitness. "A court must analyze each claim and determine if it is 'based upon' commercial activity. ." *Lasheen*, 603 F.3d at 1172. We begin with Sachs's negligence claim.

To show negligence, Sachs must establish that OBB owed her a duty of care. Under Sachs's theory of the case, OBB owed her a duty of care because her purchase of the Eurail pass established a common-carrier/passenger relationship. It is well established that common carriers owe a duty of utmost care to their passengers. *See Andrews v. United Airlines Inc.*, 24 F.3d 39, 40 (9th Cir. 1994) (applying California law);[14] *see also* Restatement (Third) of Torts § 40(b)

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[14] Some courts have said that "as a general matter, state substantive law is controlling in FSIA cases." *E.g., Barkanic v. General Administration of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 959 (2d Cir. 1991) (citing *Bancec*, 462 U.S. at 622 n.11). The Supreme Court in *Bancec* stated in pertinent part: "Section 1606 provides that '[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity . . , the foreign state shall be liable in the same manner and to the same extent as a private individual in like circumstances.' Thus, where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." *Bancec*, 462 U.S. at 622 n.11 (quoting 28 U.S.C. § 1606). So we think it is a permissible view of Supreme Court precedent to look to California law to determine the elements of Sachs's claims.

However, it may also be permissible to view the above cases as suggesting there be a choice-of-law decision, either based on the forum's choice of law principles, or some other rule. We have held that, with no choice-of-law provision expressed in the FSIA, we should use the choice-of-law principles of the federal common law, which leads us to the Second Restatement of Conflicts. *See Schoenberg*, 930 F.2d at 782. The Second Restatement factors for the "more significant relationship" test include: the needs of the interstate and international systems; the relevant policies of the forum; the relevant policies of other interested states; the protection of justified expectations; the policies underlying a field of law; ideas on certainty, predictability, and uniformity of

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(2012) ("Special relationships giving rise to the duty [of reasonable care] include a common carrier with its passengers."). And the basis for that duty of care is established when a foreign state or its agent sells a ticket or otherwise makes travel arrangements for passage abroad. *See Santos,* 934 F.2d at 893-94.

Here, buying the Eurail pass from RPE was the start of Sachs's tragic misadventure, and buying the pass in the United States helped to define the scope of duty owed by common carrier OBB to the pass purchaser and traveler, Sachs. Because the sale of the Eurail pass is an essential fact that Sachs must prove to establish her passenger-carrier relationship with OBB, a nexus exists between an element of Sachs's negligence claim and the commercial activity in the United States. *See Kirkham,* 429 F.3d at 292 ("[S]o long as the alleged commercial activity establishes a fact without which the plaintiff will lose, the commercial activity exception applies. "). Without the pass, Sachs could not have boarded, or tried to board, the OBB train in Innsbruck. Moreover, the Eurail pass

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result; and ease in determination and application of applicable law. *Id.* at 783; *see* Restatement (Second) of Conflicts § 6(2) (1971). Even if we should make a separate conflicts analysis under the Restatement, that conflicts analysis supports the same conclusion that California law applies to Sachs's claims. Although Sachs was injured in Austria, the purchase of the common carrier ticket occurred in California. California has a strong interest in providing compensation to its residents under its law when those residents buy a common carrier ticket in California and then travel abroad on state-owned transportation.

created an exclusive relationship between OBB and Sachs. No one could use this pass but Sachs. The Eurail pass bore her name, said that it was non-transferrable, and required that she present a valid passport to use it. Thus, the sale of the Eurail pass in the United States is "necessary to the 'duty of care' element of [Sachs's] negligence claim." *Id.* To demand more at the jurisdictional phase is to require a plaintiff to prove the merits of her claim, "expanding the category of jurisdictional facts to include actions and events other than the actual commercial activity which triggers the exception." *Id.* at 293.

Sachs's purchase of the couchette reservation upgrade in Innsbruck does not change our conclusion. The passenger-carrier relationship had already been established, and the couchette purchase did not change this relationship or OBB's duty in any way; it rather upgraded the means of her transit in Austria. OBB acknowledges that Sachs could have boarded the train from Innsbruck to Prague with just her Eurail pass, so the couchette reservation merely constitutes an upgrade to her existing pass, not a new transaction. The situation is similar to a person who buys a coach-class airline ticket but pays an additional fee for a first-class upgrade before boarding the plane. The latter is not a new transaction that changes the duty of care owed by the airline to the passenger. Similarly, Sachs's purchase of the upgrade changed nothing about the duty of care OBB owed her. Because the sale of the Eurail pass in the United States forms the basis of an element of Sachs's

negligence claim, she satisfies the "based upon" requirement for that claim.

OBB contends that this conclusion is inconsistent with our decision in *Sun v. Taiwan*. We disagree. In *Sun*, we considered whether the appellants could bring a wrongful death action against Taiwan under the commercial-activity exception after their son drowned during a cultural tour of Taiwan. 201 F.3d at 1106. The Suns alleged that Taiwan was negligent by failing to warn their son of the swimming hazards and failing to exercise reasonable supervision. *Id.* at 1109. We concluded that Taiwan had engaged in commercial activity in the United States by promoting and managing applications for the program, but that this activity did not form the basis of Sun's negligence claims. *Id.* at 1110. We explained that "[t]he promotion and application process in the United States was not conduct involved in proving any of the elements of the Suns' action." *Id.*[15] Sachs's negligence claim is different from that considered in *Sun* because OBB's conduct in the United States – the sale of the Eurail pass – is essential to proving the duty-of-care element of Sachs's negligence claim.

Similarly, our conclusion is consistent with the Supreme Court's decision in *Saudi Arabia v. Nelson*,

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[15] The Suns later claimed that the organization of the trip in the United States established a duty of care, but because that was a new issue on appeal, we did not decide it. *Sun*, 201 F.3d at 1110 & n.2.

which analyzed the "based upon" requirement of the commercial-activity exception. The Supreme Court concluded that Nelson's action "alleging personal injury resulting from unlawful detention and torture by the Saudi Government [was] not 'based upon a commercial activity' within the meaning of [the FSIA]." *Nelson,* 507 U.S. at 351. To reach this conclusion, the Court rejected Nelson's argument that the defendant's act of recruiting and signing a contract with Nelson in the United States was the relevant commercial activity that formed the basis of Nelson's tort claims. *Id.* at 358. Although those acts within the United States preceded the torts alleged by Nelson, they were not relevant to proving Nelson's claims. *Id.* In contrast, Sachs's negligence claim requires her to show that OBB owed her a duty of care as a passenger on its train – a duty based upon the sale of the Eurail pass within the United States.

For similar reasons, we conclude that Sachs's breach-of-implied-warranty claims and strict-liability claims are "based upon" the sale of the Eurail pass.[16] Products-liability claims and breach-of-implied-warranty claims are variations on a theme: attributing liability based on the sale of a product into the

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[16] We review Sachs's claims only to the extent necessary to determine whether jurisdiction exists under the FSIA. Whether Sachs has properly pleaded these claims is not before us. *See Kirkham,* 429 F.3d at 293 (explaining that the jurisdictional inquiry under the FSIA is distinct from the Rule 12(b)(6) analysis).

market. *See Greenman v. Yuba Power Prods. Inc.*, 377 P.2d 897, 900-901 (Cal. 1963) (discussing implied warranties and strict liability for design defects); *see also* Dan B. Dobbs et al., *The Law of Torts* § 448 (2d ed. 2011) ("To a large extent, the law of implied warranty gradually merged with strict tort liability."). A transaction between a seller and a consumer is a necessary prerequisite to proving either type of claim. *See* Restatement (Second) of Torts § 402A (1965) (establishing liability for those who sell products to consumers); West's Ann. Cal. Com. Code § 2314(1) ("[A] warranty that the goods shall be merchantable is implied in a contract for their sale. "); West's Ann. Cal. Com. Code § 2315 (establishing an implied warranty that the goods shall be fit for a particular purpose at the time of contracting). Here, the sale relevant to proving these claims is the sale of the Eurail pass to Sachs in the United States.[17] As we explained above, Sachs's purchase of the couchette upgrade does not change our conclusion because her

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[17] The dissent of Judge O'Scannlain does not contest that if the ticket sale of the Eurail pass to Sachs in the United States was commercial activity of OBB, then the negligence claim is based on that conduct in the sense that one of the elements of negligence is the creation of the duty of the common carrier. But the dissent of Judge O'Scannlain argues that strict liability stands on a different footing because that claim does not require privity of contract. This misses the point. Under the standard formulation for strict liability for harm to a consumer, there must be a sale of the product. *See* Restatement (Second) of Torts § 402A (1965). Here, the sale by RPE was in the United States, and there is jurisdiction on the strict liability claim.

existing Eurail pass was a necessary precedent to the upgrade. Because the sale of the Eurail pass in the United States forms an essential element of each of Sachs's claims, we conclude that Sachs's claims are "based upon a commercial activity carried on in the United States" by OBB.[18] 28 U.S.C. § 1605(a)(2).

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[18] Chief Judge Kozinski, though he joins Judge O'Scannlain's dissenting analysis, launches his own independent theory to take agency out of the case. Thus, Chief Judge Kozinski's dissent argues that even if the Eurail pass tickets here sold by OBB's agent had been sold directly by Austria "from a kiosk in Times Square," Chief Judge Kozinski Dissent at 53, nonetheless, Sachs's claims would not be based upon commercial activity in the United States. To reach this conclusion, Chief Judge Kozinski would simply overrule all prior case law in the Ninth Circuit which had held that it was sufficient if an element of the claim was supported by the domestic commercial activity. Chief Judge Kozinski, in his separate dissent, does not persuasively rebut the reasoning of our precedents holding, or the Supreme Court's prior opinion in *Nelson*, 507 U.S. at 358 n.4, leaving open, that commercial activity in the United States, supporting an element of a claim, was sufficient for jurisdictional purposes.

Further, the cases that Chief Judge Kozinski relies upon do not have the type of nexus to the United States that would be created, using his hypothetical example, by Austria itself selling its Eurail pass tickets from a kiosk in Times Square. *Sosa* concerned a Mexican physician's suit against the United States under the Federal Tort Claims Act, after he was seized by Mexican nationals in Mexico at the behest of the U.S. Drug Enforcement Agency. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 697-98 (2004). *Sosa* did not involve the FSIA. *Kiobel* concerned the alleged complicity of foreign corporations with the Nigerian government for atrocities committed in Nigeria against Nigerian citizens, in violation of international law norms. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1662-63 (2013).

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V

We hold that the first clause of the FSIA commercial-activity exception applies to a common carrier owned by a foreign state that acts through a domestic agent to sell tickets to United States citizens or residents for passage on the foreign common carrier's transportation system. Sachs has met her burden of proving that the first clause of the commercial-activity exception applies. The district court erred in concluding that it lacked subject-matter jurisdiction over Sachs's claims. We reverse and remand for further proceedings consistent with this

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Kiobel was an Alien Tort Statute case, and did not involve the FSIA. *Morrison* concerned securities transactions that neither occurred in the United States nor involved securities listed on U.S. exchanges. *See Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010). *Morrison* did not involve the FSIA.

Cases like *Sosa*, *Kiobel*, and *Morrison*, while they caution against opening U.S. courts or applying U.S. laws to foreign activities of foreign entities, do not engage with the commercial-activity exception of the FSIA, and do not properly bear on whether that exception can be satisfied by a foreign country selling common carrier tickets through a kiosk in Times Square, Chief Judge Kozinski's hypothetical, or on the practice of foreign sovereign airlines or rail systems selling tickets in the United States through travel agents within the United States. Congress enacted the commercial-activity exception so that foreign sovereigns, if they engaged in commercial activity in the United States, could be called into account in our courts.

opinion, including consideration of the other claims raised by OBB in its motion to dismiss.[19]

REVERSED and REMANDED.

O'SCANNLAIN, Circuit Judge, dissenting, with whom KOZINSKI, Chief Judge, and RAWLINSON, Circuit Judge, join:

Because I am not persuaded that an instrumentality of the Republic of Austria may be subjected to the jurisdiction of the United States Courts on the basis of the facts alleged in this case, I must respectfully dissent from the decision of the en banc court to the contrary.

I

The Foreign Sovereign Immunities Act of 1976 (FSIA) is "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Under the FSIA, a foreign state is presumptively "immune from the jurisdiction of the courts of the United States" unless the plaintiff can show that his action falls within a specified statutory exception.

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[19] Whether Sachs can successfully pursue her claims depends on a great many issues that are not presently before us. We express no view on those issues.

28 U.S.C. § 1604; *see also Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1127 (9th Cir. 2012).

Exceptions to sovereign immunity must be interpreted narrowly. Courts should guard against overly broad readings because expanding federal jurisdiction in this area can have serious foreign policy consequences. *See Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1155-56 (7th Cir. 2001) ("In interpreting the FSIA, we are mindful that judicial resolution of cases bearing significantly on sensitive foreign policy matters, like the case before us, might have serious foreign policy implications which courts are ill-equipped to anticipate or handle.") (internal quotation marks omitted); *see also* J.H. Trotter, *Narrow Construction of the FSIA Commercial Activity Exception: Saudi Arabia v. Nelson*, 33 Va. J. Int'l L. 717, 733-34 (1993) ("As [the FSIA] exceptions undergo judicial expansion the strains on foreign policy intensify."). Indeed, we have expressly recognized the restricted nature of these exceptions. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1125 (9th Cir. 2010) (describing the FSIA's exceptions as "narrow"); *see also McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1075 (D.C. Cir. 2012) (describing the FSIA's exceptions as "narrowly drawn").

By expanding the commercial-activity exception to encompass the facts in this case, the court, regrettably, claims jurisdiction that is denied to us by statute.

II

Carol P. Sachs, who lives in California, purchased a Eurail pass online from Rail Pass Experts (RPE), an entity located in Massachusetts. A Eurail pass enabled her to ride railways in Austria and the Czech Republic. RPE gained authority to sell Eurail passes from the Eurail Group. OBB Personenverkehr AG (OBB), a railway wholly owned by the Austrian government, is one of many Eurail Group members. OBB and Eurail are separate entities with distinct managements, employees, and purposes. While in Austria, Sachs attempted to board a moving train operated by OBB. She fell between the platform and the train such that she landed on the tracks, suffering severe bodily injuries. Sachs has sued OBB for negligence, strict liability, and breach of implied warranties.

Our analytical task in this case is made easier by the limited nature of the parties' arguments. Sachs does not contest that OBB is an instrumentality of the Republic of Austria and therefore entitled to foreign sovereign immunity under the FSIA. The majority correctly notes that "[t]he [only] exception relevant to this appeal is the first clause of the commercial-activity provision."[1] Slip Op. at 10. The

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[1] "A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). Like

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commercial-activity exception can helpfully be divided into three requirements: (1) the activity must be commercial rather than sovereign, (2) the activity must be "carried on in the United States by the foreign state," and (3) the plaintiff's suit must be "based upon" that activity. 28 U.S.C. § 1605(a)(2).

The parties do not dispute that the only relevant commercial activity in the United States was Sachs' purchase of a Eurail pass from RPE. *See* Slip Op. at 11 n.4. OBB does not contest that the sale of the Eurail pass was commercial, rather than sovereign, activity. The first requirement is therefore satisfied. It is the two other requirements that are disputed.

III

To repeat, the commercial-activity exception applies only if the activity in question was "carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2).[2] Although the sale of the ticket by RPE clearly occurred in the United States, OBB disputes that *it* "carried on" that activity. Rather, OBB argues that the sale is attributable exclusively to RPE. *See Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 306

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the majority, I use the phrase "commercial-activity exception" to refer to the first clause of § 1605(a)(2). *See* Slip Op. at 10 n.3.

[2] Congress defined "commercial activity carried on in the United States by a foreign state" to mean "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e).

(9th Cir. 1997) ("Defendants should be permitted to argue that they did not act: that there was no commercial activity *of the foreign state.*") (internal quotation marks omitted).

To determine whether the activity is attributable to OBB, it is necessary to consider the meaning of "foreign state." Because foreign states are not natural persons, they necessarily act through agents. *See* Slip Op. at 20. The question is what principle limits the extent to which another entity's activity can be attributed to a foreign state for purposes of the FSIA.

Relying on *Phaneuf,* the majority rules that the activity of any authorized agent can be imputed to a foreign sovereign. *See* Slip Op. at 17 ("Because we conclude RPE acted as an authorized agent of OBB, we impute RPE's sale of the Eurail pass in the United States to OBB.") (citing *Phaneuf,* 106 F.3d at 307-08).[3] Thus, it effectively reads "activity carried on by a foreign state" and "activity carried on by such state" to mean activity carried on by the authorized agents

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[3] While *Phaneuf* held that an agent must have acted with actual authority in order for its actions to be attributed to a foreign state, *Phaneuf,* 106 F.3d at 308, it did not hold that actual authority was sufficient to allow for such attribution in all circumstances. The actions at issue in *Phaneuf* were taken by members of Indonesia's National Defense Security Council, rather than a corporate entity with whom Indonesia had only a loose relationship, so the closeness of the connection between the foreign state and the alleged agent was not at issue. *See id.* at 304, 307.

of a foreign state. This necessarily equates a foreign state and its authorized agents.

With respect, I suggest that such a reading is inconsistent with other provisions of the FSIA. Rather, "foreign state" must be interpreted more narrowly. The approach we adopted in *Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009), correctly interpreted "foreign state" and provides a framework with which to analyze this case. Under this narrower reading, "activity carried on by a foreign state" cannot include activity carried on by RPE.

A

The term "foreign state," of course, is used repeatedly in the FSIA, not just in the commercial-activity exception. The meaning of "foreign state" remains constant throughout the statute, and textual evidence from other provisions demonstrates that "foreign state" cannot be so broad as to include all authorized agents of a foreign state.

1

Courts generally presume that a term is used consistently throughout a statute. *See Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning."); Antonin Scalia & Bryan A. Garner,

Reading Law 170 (2012) (discussing the presumption of consistent usage).[4] Here, far from indicating that different uses of "foreign state" have different meanings, the FSIA suggests that the definition remains constant throughout the statute (with the express exception of § 1608, which is not relevant here). *See* 28 U.S.C. § 1603(a) ("*For purposes of this chapter* – (a) A 'foreign state,' except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)."") (emphasis added).

Confirming this analysis, the Supreme Court has interpreted the term "foreign state" consistently. In *Samantar v. Yousuf*, 560 U.S. 305 (2010), the Court interpreted "foreign state" as it was used in § 1604, which grants immunity to "foreign state[s]." 28 U.S.C. § 1604. In doing so, the Court expressly relied on the meaning of "foreign state" in an exception to immunity found in § 1605(a)(5). *See Samantar*, 560 U.S. at 317-18. Such approach is sensible only if "foreign state" has the same meaning in both provisions.

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[4] The majority misinterprets this analysis as applying the presumption of consistent usage to distinct phrases, "agency or instrumentality of a foreign state" in § 1603(b), "agent of that foreign state [] acting within the scope of his or her . . . agency" in § 1605A(c), and the commercial-activity exception in § 1605(a)(2). Slip Op. at 26 n.13. In reality, I apply the presumption of consistent usage to the term "foreign state," not to each phrase as a whole. Such application is consistent with *Samantar v. Yousuf*, 560 U.S. 305, 317-18 & n.11 (2010) (interpreting "foreign state" in § 1604 in light of the use of "foreign state" in § 1605A and § 1605(a)(5)).

Clearly, Supreme Court precedent indicates that "foreign state" has the same meaning when providing an exception to immunity as it does when granting immunity.

The majority, by contrast, treats the meaning of "foreign state" for the purposes of § 1604 and the meaning of "foreign state" for the purposes of § 1605 as separate inquiries. *See* Slip Op. at 20 (contrasting the status required to claim sovereign immunity and the status required for activity to be attributable under the commercial-activity exception). In light of the presumption of consistent usage and Supreme Court precedent applying it to the FSIA, I cannot accept the majority's assumption that the interpretation of this term differs so greatly between provisions.

2

Given that the meaning of "foreign state" is consistent, we can turn to analyzing the meaning of that term in other provisions of the FSIA. Textual evidence from § 1605A, which also uses "foreign state," indicates that the term does not embrace all authorized agents.

Section 1605A(c) creates a cause of action against "[a] foreign state that is or was a state sponsor of terrorism and any official, employee, or *agent of that foreign state while acting within the scope of his or her office, employment, or agency.*" 28 U.S.C. § 1605A(c) (emphasis added). In *Samantar*, the Supreme Court tells us that "the creation of a cause of

action against both the 'foreign state' and 'any official, employee, or agent' thereof reinforces the idea that 'foreign state' does not by definition include foreign officials." *Samantar*, 560 U.S. at 318 n.11 (citation omitted). Relying on § 1605A(c) and a similar provision in § 1605(a)(5), the Court invoked the rule against superfluity: "If the term 'foreign state' by definition includes an individual acting within the scope of his office, the phrase 'or of any official or employee ' in 28 U.S.C. § 1605(a)(5) would be unnecessary." *Id.* at 318 (citing *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-77 (2003) ("[W]e should not construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous.")).

Just as the inclusion of "official" in § 1605(a)(5) and § 1605A(c) would be superfluous were "foreign state" to include officials, the inclusion of "agent" in § 1605A(a)[5] and § 1605A(c) would be superfluous if "foreign state" included all agents acting in the scope of their agencies (that is, authorized agents). And just

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[5] Section 1605A(a) uses similar language to create a specific exception to immunity for:

> any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by [specified acts] if such act . . . is engaged in by *an official, employee, or agent* of such foreign state while acting within the scope of his or her office, employment, or agency.

28 U.S.C. § 1605A(a)(1) (emphasis added).

as the avoidance of superfluity in another provision informed *Samantar*'s interpretation of "foreign state" in § 1604, it similarly affects the meaning of "foreign state" in § 1605(a)(2). Therefore, by the same logic that the Supreme Court used in *Samantar*, the commercial-activity exception's use of "foreign state" does not include all authorized agents.

B

Because the majority's approach is inconsistent with the text of the statute, another approach is required. Our opinion in *Holy See* provides the proper standard for attributing the actions of third parties to foreign states. In determining whether acts taken by the Archdiocese of Portland, the Catholic Bishop of Chicago, and the Order of the Friar Servants could be imputed to the Holy See for determining jurisdiction under the FSIA, the *Holy See* court relied on *First National City Bank v. Banco Para El Comercio Exterior de Cuba ("Bancec")*, 462 U.S. 611 (1983). *Bancec* created a presumption of separate status for liability purposes. *Id.* at 626-27. This presumption could be overcome "in two instances: when 'a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created,'[6] or when

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[6] As will be discussed below, the Court used the term "agent" in a different sense than the majority does. Courts have interpreted this prong of the *Bancec* standard to refer to an "alter ego" analysis. *See, e.g., Holy See*, 557 F.3d at 1080 (comparing the *Bancec* standard to an "'alter ego' or 'piercing the

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recognizing the separate status of a corporation 'would work fraud or injustice.'" *Holy See*, 557 F.3d at 1077-78 (quoting *Bancec*, 462 U.S. at 629).

While *Bancec* dealt with questions of substantive liability rather than jurisdiction, *Holy See* decided that the standard announced in *Bancec* applied to jurisdictional questions as well. *See Holy See*, 557 F.3d at 1079. Thus, a determination of whether to attribute the actions of another entity to a foreign state for jurisdictional purposes begins with a presumption against such attribution. That presumption can be rebutted if the other entity is the alter ego of the foreign state or if failure to attribute the entity's actions to the foreign state "would work fraud or injustice." *Id.* at 1077-78. Other circuits have applied *Bancec* to jurisdictional issues as well. *See Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 848 (D.C. Cir. 2000); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533 (5th Cir. 1992).

The standard from *Holy See* fits the statutory text well. *Holy See* counsels in favor of reading "activity by a foreign state" to mean activity by a foreign state, its alter ego, or an entity the recognition of

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corporate veil'" standard); *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 848 (D.C. Cir. 2000) (noting that "in the case cited by the Supreme Court to illustrate the agency exception, various corporations were allegedly operated as a 'single enterprise.'").

whose separateness would work fraud or injustice.[7] Incorporation of the *Bancec* standard has the considerable benefits of not rendering any statutory terms superfluous and being capable of consistent application throughout the FSIA. An interpretation of "foreign state" that includes a foreign state's alter ego would not make any words in § 1605A superfluous. *See supra* Part III.A.2.

The majority purports to distinguish *Holy See* on the ground that *Bancec* and *Holy See*, unlike this case, arose in the context "of corporate affiliates." Slip Op. at 18 (distinguishing "a corporate relationship" from "principles of agency"). Even assuming the validity of this distinction, the majority draws the wrong conclusion. That *Holy See* applies a stringent alter ego test to the activity of corporate affiliates does not suggest that we should apply a more lenient authorized agent standard to the activity of non-affiliate entities. If anything, the lack of an affiliate relationship supports application of a more stringent test because a corporate affiliate is more likely to have a close and substantial relationship with its foreign state than another entity is. That is borne out in this case: OBB may not have even been aware that RPE existed before this lawsuit. Thus, the majority's "authorized agent" standard creates an anomaly in our case law because it retains the *Holy See* standard

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[7] How (or whether) this standard would apply to the actions of an individual agent, rather than entity agent, need not be addressed in this case. RPE is an entity, not an individual.

for affiliates but creates a much looser test for non-affiliate entities that will often have fewer ties to the foreign state.

But the majority's distinction between the corporate affiliate context and the agency context is problematic for another reason as well: courts applying the *Bancec* standard have spoken expressly in terms of agency. In *Bancec* itself, the Court described the alter ego analysis as relevant because such extensive control creates "a relationship of principal and agent." *Bancec*, 462 U.S. at 629; *see also Holy See*, 557 F.3d at 1079 ("[I]n applying the jurisdictional provisions of the FSIA, courts will routinely have to decide whether a particular individual or corporation is an agent of a foreign state."). Thus, at least in certain circumstances, we have held that the *Bancec* standard is the method for determining whether another entity is an agent of a foreign state. The majority, therefore, cannot distinguish *Holy See* on the ground that it applies to the actions of corporate affiliates rather than agents.

Of particular importance here is that the meaning of "agent" or "agency" varies in different legal contexts. *See Holy See*, 557 F.3d at 1080 ("'Agent' can have more than one legal meaning."). In *Holy See*, the court contrasted the typical common law agency analysis with the first prong of the *Bancec* standard. *See id.* ("The *Bancec* standard is in fact most similar to the 'alter ego' or 'piercing the corporate veil' standards ").

The plaintiff in *Holy See* alleged a traditional agency relationship as the basis for attributing the actions of others to the Holy See. *See id.* ("Doe does directly allege in his complaint that the corporations are 'agents' of the Holy See."); Pl.-Appellee/Cross-Appellant John V. Doe's Principal and Resp. Br., 2007 WL 923313, II.C.1 ("Appellants Catholic Bishop, Archdiocese and Order, were the agents of Appellant Holy See, acting in furtherance of the purposes of the the [sic] Holy See, doing the kind of acts they were engaged to perform, and were motivated, at least in part, to further the purposes of the Holy See."). Nonetheless, the *Holy See* court ruled that it could not "infer from the use of the word 'agent' that Doe [wa]s alleging the type of day-to-day control that *Bancec* require[s] to overcome the presumption of separate juridical status." *Holy See,* 557 F.3d at 1080. If a common law agency relationship were all that is required for the imputation of an agent's actions to the foreign state, surely the court would have treated Doe's allegation differently in *Holy See*. Thus, it is clear that the sort of agency relationship that *Bancec* and *Holy See* required for the imputation of actions to the foreign state (an alter ego relationship, for example) differs significantly from the all-authorized-agents standard adopted by the majority.

C

Sachs simply cannot show that RPE's actions are attributable to OBB under the *Bancec* standard. The first method of rebutting the presumption of

separateness, the alter ego analysis, certainly cannot apply on these facts. Far from being the alter ego of OBB, RPE and Eurail are independent companies with different managements from OBB. RPE may be a subagent of Eurail, but Eurail is controlled by a group of railways, not OBB alone. The second method of rebutting the presumption of separateness – whether recognizing separate existences would work fraud or injustice – certainly does not suggest that the actions of RPE should be attributed to OBB. In *Bancec,* the Court found such equitable prong applicable because Bancec was attempting to recover money that would directly benefit the Cuban government while simultaneously arguing that its claim should not be subject to a set-off that would have applied if the Cuban government sued directly. *Bancec,* 462 U.S. at 631-32. Here, OBB has not behaved in a comparable way. OBB has not, for example, inconsistently characterized RPE's actions to its advantage; it has consistently asserted that RPE's actions cannot be attributed to it.

If there is any "injustice" at all from failing to impute RPE's actions to OBB, it stems from Sachs' inability to sue OBB in American courts. This, however, is not the sort of injustice that validates treating RPE as if it were OBB. The inability to sue in American courts is a natural result of recognizing foreign sovereign immunity, the general rule and policy of the FSIA. *See Sachs v. Republic of Austria,* 695 F.3d 1021, 1026 (9th Cir. 2012) ("Any injustice that results is no greater than the mine-run of cases – jurisdiction

over a foreign state is, after all, ordinarily not available.").

D

The majority relies on *Barkanic v. General Administration of Civil Aviation of the People's Republic of China*, 822 F.2d 11 (2d Cir. 1987), and *Kirkham v. Societe Air France*, 429 F.3d 288 (D.C. Cir. 2005). These cases do not analyze when the acts of agents can be attributed to a foreign state. As acknowledged by the majority, *see* Slip Op. at 14 n.5a, the parties in *Barkanic* and *Kirkham* did not dispute that the relevant actions constituted activity of the foreign state. *See Barkanic*, 822 F.2d at 13 (assuming without discussion that a ticket sale by Pan American was attributable to the defendant); *Kirkham*, 429 F.3d at 291-92 (noting that the "sole question" before the court related to the "based upon" prong of the commercial-activity exception). Although those courts "had an independent duty to assess jurisdiction," *see* Slip Op. at 14 n.5b, their decisions "do[ ] not stand for the proposition that no defect existed." *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436, 1448 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.").

The majority makes much of the possibility that, if its reading were rejected, federal courts would not be able to exercise jurisdiction over foreign states

based on the actions of travel agents. Slip Op. at 21-24. The majority's concern seems to stem from the idea that the lack of federal jurisdiction would leave plaintiffs to sue abroad, a result the majority describes as too "chaotic" for Congress to have intended. Slip Op. at 24. But, the general rule for the FSIA is that foreign states are immune from suit; there will be many instances in which Americans who wish to sue foreign sovereigns can only do so overseas. This is a result Congress clearly intended in many instances, so it is hard to see why the same result in this situation should strike the majority as so "chaotic."

Because Sachs has not shown that RPE and OBB have a relationship that rebuts the *Bancec* presumption of separate status, I would affirm the district court's dismissal for lack of jurisdiction.

IV

Even if the sale of the Eurail pass by RPE were "commercial activity carried on by the foreign state," sovereign immunity would still, at a minimum, bar Sachs' strict liability claims because they are not "based upon" the sale of the pass, as would be required for the commercial-activity exception to apply. 28 U.S.C. § 1605(a)(2). Assuming the majority's interpretation of this requirement is correct, I agree that Sachs' negligence and implied warranty claims would be "based upon" the sale of the Eurail pass had the sale been attributable to OBB. The Supreme Court has clarified that the commercial activity in

question, here the sale of the Eurail pass, must be an "element [] of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Saudi Arabia v. Nelson,* 507 U.S. 349, 357 (1993). The majority understands this to mean that a claim is based upon commercial activity if that activity will establish *one* element of the claim. But still, a mere connection between the claim and the commercial activity is insufficient. *Sun v. Taiwan,* 201 F.3d 1105, 1110 (9th Cir. 2000) (citing *Nelson,* 507 U.S. at 362).

The majority believes that Sachs' negligence claim is "based upon" the sale of the Eurail pass because the sale evidences that OBB, as a common carrier, owed a duty of care to Sachs, a passenger. Slip Op. at 29-31. This strikes me as a proper application of the majority's rule; however, the majority also concludes that Sachs' other claims are "based upon" the sale of the Eurail pass because the sale was the transaction necessary for an implied warranty claim or strict liability claim. Slip Op. at 33.

This theory inappropriately lumps together Sachs' strict liability claims and implied warranty claims. While the majority is correct that both types of claims center on "attributing liability based on the sale of a product into the market," Slip Op. at 33, there is a crucial difference between them. Strict liability claims do not require proof that the plaintiff entered a transaction with the defendant. *Greenman v. Yuba Power Products, Inc.,* 377 P.2d 897 (Cal. 1963), which the majority relies on to explain California law on strict liability, discusses "the abandonment of

the requirement of a contract between" the manufacturer and the plaintiff. *Id.* at 901; *see also* Restatement (Third) of Torts: Products Liability § 1 cmt a (1998) ("Strict liability in tort for defectively manufactured products merges the concept of implied warranty, in which negligence is not required, with the tort concept of negligence, in which contractual privity is not required.").

While the majority claims that Sachs' strict liability claim requires her to prove that OBB was a "seller," Slip Op. at 33, California cases suggest that a strict liability plaintiff need not prove that the defendant is a seller. *See Price v. Shell Oil Co.*, 466 P.2d 722, 726 (Cal. 1970) ("[W]e can perceive no substantial difference between *sellers* of personal property and *non-sellers,* such as bailors and lessors. In each instance, the seller or non-seller places [an article] on the market, knowing that it is to be used without inspection for defects.") (second alteration in original) (internal quotation marks omitted); *Greenman*, 377 P.2d at 901 ("To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.") Under California law, it appears that OBB's provision of train service and Sachs' use of it are sufficient to subject OBB to strict liability. Therefore, Sachs has not established that she must prove that

OBB was a "seller" in order to prevail on her strict liability claim.

Because contractual privity is not an element of Sachs' strict liability claims, they are not "based upon" the sale by RPE, the only relevant commercial activity. Sachs, therefore, may not invoke the commercial-activity exception to overcome OBB's sovereign immunity. Even if RPE's sale of the Eurail pass to Sachs were attributable to OBB, the majority should affirm the district court insofar as it dismissed the strict liability claims for lack of jurisdiction.

V

For the foregoing reasons, I would affirm the district court's dismissal for lack of jurisdiction. Because RPE's sale of the Eurail pass is not attributable to OBB, Sachs has not alleged commercial activity "by the foreign state." Indeed, even if the majority's theory of attribution were valid, the strict liability claims would still need to be dismissed because they are not "based upon" the sale to Sachs in the United States.

Chief Judge KOZINSKI, dissenting:

I agree with Judge O'Scannlain that a foreign sovereign doesn't engage in commercial activity in the United States when a subagent over which it exercises no direct control sells tickets for passage on a

common carrier wholly owned by that sovereign. But there is another, simpler way to affirm the district court. Because plaintiff's claim arises from events that transpired entirely in Austria, it isn't "based upon" commercial activity carried on in the United States. 28 U.S.C. § 1605(a)(2). This would be true even if Austria were itself selling train tickets from a kiosk in Times Square.

The majority holds that all of plaintiff's claims are based on domestic commercial activity, relying on our cases requiring that only "'*an element*'" of the claim consist of such activity. Maj. op. at 28 (quoting *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000)). But an en banc court can overrule circuit law; in fact, that's the principal reason for taking a case en banc. *See Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1479 (9th Cir. 1987) (en banc). Because these earlier cases conflict with Supreme Court precedent, we should take the opportunity to sweep them aside.

The Supreme Court has addressed what it means for a claim to be "based upon" commercial activity only once. In *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), the Court observed that "the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357. *Nelson* emphasized the limited scope of its holding: "We do not mean to suggest that the first clause of § 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state, and we do not address the case where a claim consists of both

commercial and sovereign elements." *Id.* at 358 n.4. Some of our cases have misread this holding – that a claim *can* be based upon commercial activity even if proving that activity won't establish *every* element of the claim – for an endorsement of the converse proposition – that a claim *is* based upon commercial activity so long as proving that activity will establish at least *one* element of the claim. *See, e.g., Sun,* 201 F.3d at 1109; *Sugimoto v. Exportadora De Sal, S.A. De C.V.,* 19 F.3d 1309, 1311 (9th Cir. 1994).

This broad interpretation of the "based upon" requirement runs contrary to our "background rule that foreign states are immune from suit," subject only to "narrow exceptions." *Peterson v. Islamic Republic of Iran,* 627 F.3d 1117, 1125 (9th Cir. 2010). It also invites plaintiffs' lawyers to manufacture jurisdiction through artful pleading.

An action can frequently be brought under multiple theories, as plaintiff's negligence, breach-of-contract and product-liability claims amply demonstrate. Each of these theories accords plaintiffs plenty of opportunity to find at least one element involving domestic commercial conduct. For example, the Supreme Court observed in *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004), that "'[i]t will virtually always be possible to assert that the negligent activity that injured the plaintiff [abroad] was the consequence of faulty training, selection or supervision in the United States.'" *Id.* at 702 (second alteration in original) (quoting *Beattie v. United States,* 756 F.2d 91, 119 (D.C. Cir. 1984) (Scalia, J., dissenting)). *Sosa*

considered a claim under the Federal Tort Claims Act (FTCA) arising out of plaintiff's abduction in Mexico. Although the Court recognized that negligent acts or omissions during the planning stages in the United States may have contributed to the injury, this was not sufficient to overcome the FTCA's exclusion of "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k).

This mode of analysis applies with even greater force when we are dealing with suits against foreign sovereigns. Earlier this year, the Supreme Court cited "the danger of unwarranted judicial interference in the conduct of foreign policy" in holding that the Alien Tort Statute did not automatically apply to violations of the law of nations that occur within the territory of a foreign sovereign. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). Similarly, in *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), the Court interpreted Section 10(b) of the Securities Exchange Act of 1934 as inapplicable to transactions that neither occurred in the United States nor involved securities listed on U.S. exchanges. *Id.* at 2886. Although the government argued that the term "in connection with the purchase or sale of any security registered on a national securities exchange" should be read more broadly, the Court reasoned that "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever

some domestic activity is involved in the case." *Id.* at 2884 (emphasis in original).

The *Nelson* Court recognized the perils of an overly permissive reading of the FSIA's "based upon" requirement when it rejected plaintiff's failure-to-warn claim as a "semantic ploy" designed to dress up what was, at its heart, an intentional tort claim based on conduct that occurred exclusively in Saudi Arabia. *Nelson,* 507 U.S. at 363. It didn't dispute that the commercial activity would prove one element of a failure-to-warn claim, but recognized that "[t]o give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity." *Id.*

Our case illustrates the expansive sweep of the majority's approach. Plaintiff had a train ticket to travel from Austria to the Czech Republic. She was injured due to defendant's alleged negligence when she tried to board. The injury and any negligence occurred in Austria. But, because plaintiff happened to buy her ticket online from a vendor in Massachusetts, a federal court in California now asserts power to hale the Austrian government before it and make it defend against a claim based on facts that occurred in Austria. This makes as much sense as forcing Mrs. Palsgraf to litigate her case in Vienna.

As the *Sosa* Court recognized with respect to the FTCA, a critical element in this analysis is proximate causation, with jurisdiction hinging on whether "the

act or omission [in the United States] was sufficiently close to the ultimate injury, and sufficiently important in producing it, to make it reasonable to follow liability back to the [domestic] behavior." *Sosa*, 542 U.S. at 703. "[U]nderstanding that California planning was a legal cause of the harm in no way eliminates the conclusion that the claim here arose from harm proximately caused by acts" abroad. *Id.* at 704. Because plaintiff hasn't shown a sufficient nexus between her purchase and the injury, we have no jurisdiction over Austria. I would affirm the district court on that basis. *See Weiser v. United States*, 959 F.2d 146, 147 (9th Cir. 1992) ("Our review is not limited to a consideration of the grounds upon which the district court decided the issues; we can affirm the district court on any grounds supported by the record.").

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAROL P. SACHS,

Plaintiff-Appellant,

v.

REPUBLIC OF AUSTRIA; OBB HOLDING GROUP; OBB PERSONENVERKEHr AG,

Defendants-Appellees.

No. 11-15458

D.C. No. 3:08-cv-01840-VRW

OPINION

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Submitted June 13, 2012*
San Francisco, California

Filed September 26, 2012

Before: Ronald M. Gould, Richard C. Tallman, and Carlos T. Bea, Circuit Judges.

Opinion by Judge Tallman;
Concurrence by Judge Bea;
Dissent by Judge Gould

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

COUNSEL

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Juan C. Basombrio, Dorsey & Whitney LLP, Costa Mesa, California, for appellees OBB Personenverkehr, AG.

OPINION

TALLMAN, Circuit Judge, announcing the judgment of the Court:

In this case we consider what acts may be attributed to a foreign state in applying the commercial activity exception to immunity under the Foreign Sovereign Immunities Act.

Carol Sachs sued Austrian-owned OBB Personenverkehr after sustaining personal injuries as a result of her attempt to board a moving train in Innsbruck. The district court ruled that the commercial activity exception to the Foreign Sovereign Immunities Act did not apply and dismissed Sachs's suit for lack of subject matter jurisdiction. Sachs appeals the district court's order. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

I

In March 2007, Sachs purchased a Eurail pass in California from Rail Pass Experts, a company based

in Massachusetts. A Eurail pass is a train ticket that allows passage on various railways of the Eurail Group, an association of thirty-one European railway transportation providers. Sachs's pass permitted travel in Austria and the Czech Republic. In April Sachs traveled to Austria, where she intended to originate her journey, and there purchased a sleeper upgrade to her ticket at a local train station. A few days later, on April 27, 2007, Sachs arrived at the Innsbruck train station and attempted to board a moving train. She fell to the tracks through a gap in the platform and suffered injuries that ultimately required the amputation of both legs above the knee.

OBB Personenverkehr ("OBB") is the Austrian national railway. OBB Holding Group ("Holding Group") owns 100% of OBB's stock. The Republic of Austria created Holding Group under Austrian railway law, and the Republic's Federal Ministry of Transport, Innovation and Technology is the sole shareholder of Holding Group. OBB is not required to pay income or corporate tax and, through its parent Holding Group, forwards all profits to the Austrian government.

The Eurail Group ("Eurail") is an association organized under Luxembourg law. OBB and thirty other European railways own Eurail. Eurail is a distinct legal entity and employs its own management and employees. Eurail is tasked with, among other things, the marketing and sale of Eurail passes.

Sachs filed a complaint in the Northern District of California against the Republic of Austria, Holding Group, and OBB. She asserted claims of negligence, design defect, failure to warn, and breach of the implied warranties of merchantability and fitness, premising federal jurisdiction on diversity. Holding Group was not served and is not a party to this case. The Republic of Austria and OBB moved to dismiss based on lack of subject matter jurisdiction. Sachs did not oppose Austria's motion and the district court granted it. The district court at first did not rule on OBB's motion, instead calling for supplemental briefing on whether the actions of Rail Pass Experts could be imputed to OBB. On January 28, 2011, the district court granted OBB's motion to dismiss after concluding that OBB was immune from suit. This appeal followed.

II

The "sole basis" by which courts in the United States may obtain jurisdiction over foreign states is the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq. Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Under the FSIA, foreign states are presumptively immune from suit in federal and state courts, subject to a number of exceptions. *Embassy of the Arab Republic of Egypt v. Lasheen*, 603 F.3d 1166, 1169 (9th Cir. 2010); *see also* 28 U.S.C. § 1604. These exceptions are found in 28 U.S.C. § 1605 and § 1607, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983),

and "focus on actions taken by or against a foreign sovereign." *In re Republic of Phil.*, 309 F.3d 1143, 1150 (9th Cir. 2002). The exceptions include actions in which the foreign state has waived its immunity, 28 U.S.C. § 1605(a)(1), and actions involving the foreign state's successor interest in property located in the United States, *id.* § 1605(a)(4). "The two most commonly invoked exceptions to immunity, however, are those for commercial acts and for tortious acts." *Wolf v. Fed. Republic of Ger.*, 95 F.3d 536, 541 (7th Cir. 1996) (citing 28 U.S.C. § 1605(a)(2) & (a)(5)).[1]

Sachs, as the party bringing suit against a foreign state, must offer evidence that an exception to

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[1] The commercial activity exception withdraws immunity from a foreign state in any case

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). The tortious act exception, for its part, deprives a foreign state of immunity in cases

> not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

Id. § 1605(a)(5).

immunity applies. *See Joseph v. Office of Consulate Gen. of Nigeria,* 830 F.2d 1018, 1021 (9th Cir. 1987). If she does so, OBB would bear the burden of establishing by a preponderance of the evidence that the exception does not apply. *See id.* We review de novo a district court's determination regarding sovereign immunity under the FSIA. *Corzo v. Banco Cent. de Reserva del Peru,* 243 F.3d 519, 522 (9th Cir. 2001).

III

The parties agree that the only exception relevant to this appeal is the commercial activity exception, which deprives foreign sovereigns of immunity in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). There is no dispute that OBB, as an "agency or instrumentality" of Austria, *id.* § 1603(a), constitutes a "foreign state" for the purposes of the FSIA.

Sachs's argument for jurisdiction is scattershot but is premised upon the fact that the sale of the Eurail pass by Rail Pass Experts is a commercial activity that should be imputed to OBB. Both parties agree that the purchase of the Eurail pass is the only commercial activity within the United States relevant to this case. But OBB denies that it was commercial activity *by the state* because any connection between Rail Pass Experts and OBB is so attenuated.

A.

We previously grappled with the question of which acts could be attributed to a foreign state under the FSIA in *Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009) (per curiam), *cert. denied*, 130 S. Ct. 3497 (2010). John V. Doe, the plaintiff in that case, brought vicarious liability claims, among others, against the Holy See for the actions of its subordinates, including the Archdiocese of Portland, Oregon (Archdiocese), the Catholic Bishop of Chicago (Bishop), and the Order of the Friar Servants (Order). Doe alleged that Father Ronan, a member of the Order and priest in the Archdiocese, had sexually assaulted him when he was a teenager. *Id.* at 1069. The district court held that the commercial activity exception to immunity did not apply but that the tortious act exception did, thus granting it jurisdiction. *Id.* at 1071. The Holy See countered that it retained immunity from suit because the acts of the Archdiocese, the Bishop, and the Order could not properly be imputed to it for jurisdiction purposes. *Id.* at 1076.

On appeal, we recognized that "in applying the jurisdictional provisions of the FSIA, courts will routinely have to decide whether a particular individual or corporation is an agent of a foreign state." *Id.* at 1079. We looked for guidance in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611 (1983). In *Bancec*, the Supreme Court considered the inverse situation from the one we faced in *Holy See* – that is, when the actions of a foreign state could be attributed to its

subordinate. *Id.* at 620. The Cuban government had established Bancec as an official credit union, owned all of its stock, and supplied its capital. *Id.* at 613-14. In 1960 Cuba nationalized all U.S. property in the country, including banks. Citibank had previously issued Bancec a letter of credit related to a sugar sale but, when Bancec presented the letter for payment, Citibank paid the amount sought less the value of its expropriated Cuban branches. *Id.* at 614-15. Bancec then brought suit in federal district court seeking to collect on the full value of the letter of credit and Citibank counterclaimed. *Id.* at 615.

The Court considered whether Bancec was liable on Citibank's expropriation claim; jurisdiction was not at issue in the case. *Id.* at 619-21. As we noted in *Holy See*, the Supreme Court "recognized a presumption of 'separate juridical status'" for subordinates of foreign states. 557 F.3d at 1077 (quoting *Bancec*, 462 U.S. at 624) (brackets omitted). The Court clarified that this presumption will be negated only (1) "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created" or (2) where recognizing the presumption "would work fraud or injustice." *Bancec*, 462 U.S. at 629 (internal quotation marks omitted). Relying on the second, equitable prong, the Court held Bancec liable because recognizing its separate status would permit Cuba, the true beneficiary behind the by-then-defunct bank, to enforce the bank's claim against Citibank while simultaneously avoiding jurisdiction

on the creditor's counterclaim against the Cuban government. *Id.* at 630-32.

We expressly adopted this analysis in *Holy See* and extended it to the jurisdiction phase of the FSIA, joining the Fifth and D.C. Circuits in so doing. 557 F.3d at 1078-79 ("Applying *Bancec*'s presumption – as well as the standard for overcoming that presumption – at the outset of a suit as well as at the merits phase makes good sense."). Turning to the facts of the case, we concluded that Doe's allegations were not sufficient under the *Bancec* standard to overcome the presumption of the Holy See's separate juridical status. *Id.* at 1079. Doe did not allege the required "day-to-day, routine involvement" by the Holy See in its subordinates' operations to establish the existence of a principal – agent relationship. *Id.* (citing *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065 (9th Cir. 2002)). The fact that the Holy See created those entities and even regulated them was not enough. *Id.* at 1079-80. Nor was jurisdiction proper under the equitable prong. "Doe ha[d] not alleged that the Holy See inappropriately used the separate status of the corporations to its own benefit, as in *Bancec*, or that the Holy See created the corporations for the purpose of evading liability for its own wrongs." *Id.* at 1080.

The lay of the land after *Holy See* is thus considerably clearer. In determining "which of the acts alleged in the complaint may legitimately be attributed to the [foreign state] for purposes of establishing jurisdiction [under the FSIA]," we first must recognize

that a foreign state has a presumption of separate juridical status. *Id.* at 1076, 1079. That presumption is overcome only if the complaint alleges "day-to-day, routine involvement" of the foreign state in the individual or corporation's affairs, *see id.* at 1079, or if maintaining the presumption would "work fraud or injustice," *see id.* at 1078-79.

B.

Sachs's allegations do not withstand this scrutiny. Rail Pass Experts' sale of the Eurail pass cannot, under *Holy See*, be imputed to OBB. Like John V. Doe, Sachs "does not allege day-to-day, routine involvement of" OBB in Eurail Group, much less Rail Pass Experts. *See id.* at 1079. She alleges that Eurail Group is owned by and represents OBB and that Rail Pass Experts was in turn an agent for Eurail Group. But these facts fall far short of what the *Bancec* standard requires. In *Flatow v. Islamic Republic of Iran,* for example, we applied the *Bancec* standard at the merits phase to determine whether the actions of a bank could be imputed to Iran. 308 F.3d at 1069, 1071. Despite the fact that Iran nationalized and fully owned the bank, as well as proposed candidates for its board of directors, we held that these allegations were insufficient to negate the presumption of separate juridical status. *Id.* at 1071-74.

The best Sachs can allege is that OBB, as a part-owner along with thirty other owners, wielded some degree of control over Eurail Group and was aware

that Eurail Group used U.S. sales agents like Rail Pass Experts. But even these facts are not nearly enough under *Holy See*. Sachs has nowhere alleged that OBB was involved in Rail Pass Experts' routine, day-to-day operations, *see Holy See*, 557 F.3d at 1079; in fact, it is not clear that OBB was even aware that Rail Pass Experts existed. Nor is it alleged that OBB was involved in Eurail Group's affairs to this high degree. Eurail Group has its own independent management. The connection between OBB and Rail Pass Experts is not close enough under the first prong of the *Bancec* standard to overcome the presumption of separate juridical status and impute the sale of the Eurail pass to OBB.

Nor would granting immunity to OBB "work fraud or injustice," *Bancec*'s second method for overcoming the presumption of separate juridical status. *See id.* at 1077-78 (quoting *Bancec*, 462 U.S. at 629). It is undisputed that OBB itself engages in no commercial activity in the United States, presumably in part to retain immunity from suit in American courts. Any injustice that results is no greater than in the mine-run of cases – jurisdiction over a foreign state is, after all, ordinarily not available. *See Verlinden*, 461 U.S. at 488. And this case is a far cry from *Bancec*, where Cuba, the real beneficiary behind a defunct bank, wanted to collect on the bank's claim against Citibank but deny jurisdiction on Citibank's counterclaim against the Cuban government. *Bancec*, 462 U.S. at 631-33; *see also Flatow*, 308 F.3d at 1072 ("[U]nlike in *Bancec*, [Bank Saderat Iran] is not

attempting to use a United States court to recover on a claim while at the same time trying to avoid being the subject of an adversary proceeding."). There is no similar sleight of hand by OBB that would trump the presumption of its separate juridical status. *See Holy See,* 557 F.3d at 1079. OBB thus engaged in no commercial activity within the United States that would strip it of its immunity to suit.

C.

The concurrence and dissent argue that the above precedent is not applicable to our case because in *Holy See* we considered the tortious act exception to immunity rather than the commercial activity exception. This distinction was not meaningful to our analysis in *Holy See*, nor should it be here.

Our opinion in *Holy See* contains expansive language regarding its applicability to FSIA cases. After deciding that the actions of the Archdiocese, the Order, and the Bishop were not attributable to the Holy See, we concluded that the plaintiff had "therefore not alleged sufficient facts to demonstrate that *any* exception to sovereign immunity applies to that cause of action." *Holy See,* 557 F.3d at 1080 (emphasis added). We also noted that "in applying the jurisdictional provisions of the FSIA, courts will routinely have to decide whether a particular individual or corporation is an agent of a foreign state," and that "*Bancec* provides a workable standard for deciding this question." *Id.* at 1079. Nowhere did we indicate

that this holding should be cabined to the tortious act exception and indeed such an interpretation would fly in the face of a plain reading of this language.

The question of which acts of a corporation or an individual may be imputed to the foreign state is preliminary to consideration of individual exceptions to immunity, as we have previously recognized: "Before turning to the question of which, if any, of the FSIA's exceptions to immunity apply, we must determine which of the acts alleged in the complaint may legitimately be attributed to the Holy See for purposes of establishing jurisdiction." *Id.* at 1076. There is nothing ambiguous in this holding. If we had wanted to restrict our analysis to the tortious act exception alone, we would have done so explicitly instead of using such sweeping language.

Nor does any of the precedent we cited in *Holy See* evince its exclusivity to the tortious act exception; if anything the caselaw suggests the opposite. *Holy See* borrowed its attribution standard directly from *Bancec*. *Id.* at 1079-80. But the Supreme Court in *Bancec* was not concerned with amenability to suit – its analysis focused on what acts could be imputed to the state for purposes of liability, which *Holy See* extended to jurisdiction, *id.* at 1077-78 – so there is no reason why its standard would apply to one exception to immunity but not the others.

Most tellingly, in *Holy See* we expressly aligned ourselves with two other circuits that had extended this same *Bancec* analysis to the jurisdiction phase

and that did so under the commercial activity exception. *Id.* at 1078; *see also Transamerica Leasing, Inc. v. La Republica de Venez.*, 200 F.3d 843, 847-48 (D.C. Cir. 2000); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533-36 (5th Cir. 1992). That *Holy See* involved the tortious act exception did not seem to matter when we relied on these cases for support in adopting the *Bancec* standard for the FSIA's jurisdiction phase. *Holy See*, 557 F.3d at 1078 ("The Supreme Court in *Bancec* did not have the opportunity to consider whether the actions of a corporation may be attributed to the sovereign for purposes of determining whether jurisdiction over that sovereign exists. We have not previously addressed that question either. At least two other circuits, however, faced with such a scenario, have applied *Bancec*'s substantive corporate law principles in determining whether jurisdiction exists under the FSIA." (internal footnote omitted and italics removed)). By relying on two circuits that applied *Bancec* in the context of the commercial activity exception in a tortious act exception case, *Holy See* stands for the proposition, at least implicitly, that what immunity exception may or may not apply makes no difference to which actions of a corporation can be attributed to the sovereign.

Out-of-circuit caselaw confirms that the *Bancec* standard is applicable to the FSIA's jurisdictional provisions regardless of which exception is at issue. The standard is in no way unique to tort cases. Both *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d at 847-54, and *Arriba Ltd. v. Petroleos*

Mexicanos, 962 F.2d at 533-36, extended *Bancec* to the jurisdiction phase in cases involving the commercial activity exception. Likewise the Northern District of Illinois, *citing our decision in Holy See*, applied *Bancec* to this provision. *In re Potash Antitrust Litig.*, 686 F. Supp. 2d 816, 821-22 (N.D. Ill. 2010). Another district court decision extended *Bancec* to a case involving § 1605(a)(3), the "takings" exception, an entirely different exception to immunity. *Freund v. Republic of Fr.,* 592 F. Supp. 2d 540, 558-59 (S.D.N.Y. 2008). The dissent provides no case, in fact, that suggests that *Bancec* might apply to one of the FSIA's jurisdictional provisions but not to all. The absence of such authority is striking.

It is true, as the dissent notes, that we did not specifically consider the commercial activity exception to immunity in *Holy See,* 557 F.3d at 1076, but it is unclear why this fact should make a difference in the present case. Our decision in *Holy See* viewed the question of which exception to immunity might apply as totally separate from the issue of which acts were attributable to the foreign state. The structure of the opinion supports this interpretation. The opinion has four sub-headings in its "Analysis" section. The first two discuss the standard of review and jurisdiction over the appeal. The third is entitled "Determining Which Acts May Be Attributed to the Holy See for Jurisdictional Purposes," and in a fourth we finally address the tortious act exception. If the standard for determining which acts of a corporation were attributable to the sovereign were unique to the tortious

act exception, it would have made sense to analyze them together. Yet in our discussion of agency/attribution we did not once mention the tortious act exception of § 1605(a)(5) – or any other exception for that matter – which would be odd if we were anchoring our analysis to the text of that statutory subsection alone.

Even if *Holy See* were only applicable to certain, but not all, of the FSIA's exceptions to immunity, the commercial activity and tortious act exceptions are closely tethered by the statutory text. "The tortious activity exception provides jurisdiction over tort actions not encompassed in the commercial activity exception 'in which money damages are sought against a foreign state for damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state.'" *Joseph*, 830 F.2d at 1025 (quoting § 1605(a)(5)) (alteration in original).

There is nothing in our opinion in *Holy See* to suggest that we meant to restrict its applicability to the tortious act exception. Even assuming the decision is not directly controlling, given the opinion's language, precedent, and structure there is no intelligible reason why we should not apply it in a closely analogous case. The concurrence and dissent do not even attempt to explain by what limiting factor *Bancec* would apply to the tortious act exception and not the commercial activity exception.

D.

Even were we to accept the suggestion that *Holy See* is not controlling on this case, we reject Sachs's and the dissent's contention that *Barkanic v. General Administration of Civil Aviation of the Peoples* [sic] *Republic of China*, 822 F.2d 11 (2d Cir. 1987), and *Kirkham v. Société Air France*, 429 F.3d 288 (D.C. Cir. 2005), elucidate our task. In each of these cases the court held that the commercial activity exception applied and that the foreign state was not immune from suit. But agency was undisputed in both *Kirkham* and *Barkanic* and thus neither squarely tackles the issue before us here: whether the acts of a separate entity may be attributed to the sovereign.

In *Barkanic*, the decedents purchased tickets for an internal Chinese flight on CAAC, the Chinese state airline, from a U.S. travel agency, which the court stated was "an agent for Pan American." 822 F.2d at 12. CAAC and Pan Am entered into a bilateral general sales agency agreement whereby CAAC would act as general sales agent for Pan Am in China and Pan Am would act as general sales agent for CAAC in the United States. *Id.* CAAC maintained offices and employees in New York and operated some flights out of U.S. cities. *Id.* The decedents' flight crashed, killing them, and their estates sued the airline. *Id.* The opinion focused on whether there was a sufficient nexus between the crash and CAAC's commercial activity within the United States, but the court never explicitly analyzed what qualified as "commercial activity carried on in the United States

by the foreign state." 28 U.S.C. § 1605(a)(2); *see Barkanic*, 822 F.2d at 13.

Kirkham involved a woman who injured her foot at Orly Airport in Paris, allegedly due to the negligence of an Air France employee. 429 F.3d at 290. The plaintiff purchased her tickets from a U.S. travel agency; her trip included a flight on United Airlines from Washington, D.C., to Paris and, four days later, a flight to Corsica on Air France. *Id.* The injury occurred at the airport prior to her second flight. *Id.* Again the court focused solely on whether the claim was based upon her ticket purchase without considering commercial activity, *id.* at 291-92, in this case because "Air France concede[d] the ticket sale constituted a commercial activity in the United States." *Id.* at 293.

The dissent interprets these cases to mean "that where a foreign common carrier, operated by a sovereign entity, purposefully sells tickets for use of the carrier's services overseas through a domestic sales agent, the ticket sale is commercial activity which may be imputed to the foreign common carrier." But this conclusion assumes the answer to the question we are tasked with answering: whether Rail Pass Experts is an agent of OBB at all. Agency was undisputed in *Barkanic*, 822 F.2d at 12, and *Kirkham*, 429 F.3d at 293, whereas here it is hotly contested. It is not enough to simply note that attributing the ticket sale to the airline went "without dispute between the parties and without suggestion from either the Second Circuit or the D.C. Circuit that to do so was

inconsistent with the FSIA's commercial activity exception." We do not know why agency was undisputed and we should not speculate. But we cannot allow counsel's strategic decision to forego contesting agency in *Kirkham* and *Barkanic* to foreclose OBB's ability to do so here.

IV

It is the judgment of this Court that the district court correctly dismissed this case for lack of subject matter jurisdiction.

AFFIRMED.

BEA, Circuit Judge, concurring in the judgment:

I concur in the majority's holding that the district court correctly dismissed this case for lack of subject matter jurisdiction. I write separately, however, because I agree with Judge Gould that the definition of agency in *Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009) – a case concerning the *tortious act* exception to the Foreign Sovereign Immunities Act (FSIA) – need not be extended to the question of agency in cases concerning the *commercial activity* exception. This court's decision in *Sun v. Taiwan*, 201 F.3d 1105 (9th Cir. 2000) permits us to decide the case more narrowly, while assuming *arguendo* that an agency relationship exists between Rail Pass Experts (Experts), Eurail, and OBB Personenverkehr (OBB) which serves to impute the acts and omissions of Experts

to OBB. I would affirm the district court on the basis that Sachs fails to allege facts sufficient to give rise to jurisdiction under *Sun*.

The FSIA provides immunity to foreign states in any action "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). Sachs bases her claim of subject matter jurisdiction exclusively on the first clause of the commercial activity exception, so the relevant question in this appeal is whether her action "is based upon a commercial activity carried on in the United States by the foreign state."

In *Sun*, the Suns brought a wrongful death action against the Taiwanese government, a foreign sovereign, after their son drowned at a Taiwanese beach with claimed tricky tides, while on a trip sponsored by the Taiwanese government and advertised in the United States. 201 F.3d at 1106-07. This court held that the FSIA barred the Suns' tort claim because the claim was not "based on" the marketing and ticket sales for the tour, the commercial activity carried on by Taiwan in the United States. *Id.* at 1109. The court held that the commercial activity exception does not apply if (1) the claim alleges negligence that occurred entirely in a foreign country, or

(2) the claim alleges failure to warn and not negligent misrepresentation. *Id.* at 1109-10 & n.2. To allege a negligent misrepresentation claim that could confer jurisdiction, the plaintiff must show a nexus between failure to warn and commercial activity that occurred in the United States, *id.* at 1110, for example, by alleging failure to warn *on a ticket* sold in the United States or *in a United States advertisement.* Neither was alleged in *Sun,* until the Suns changed their theory of the case in their appellate brief. *Id.* The *Sun* panel noted this change, and it remanded the case to the district court for consideration of the Suns' amended negligent misrepresentation claim based on commercial activity which took place in the United States. *Id.*

Sachs does not allege facts sufficient to give rise to jurisdiction under *Sun.* Sachs's first set of claims – that OBB Personenverkehr (OBB) negligently moved the train, provided an unsafe place to board the rail car, failed to supervise boarding, negligently failed to stop the train, and breached various warranties – are all allegations of negligence that, for aught that appears, occurred entirely in Austria. Although Sachs does not state *where* these duties were violated, the only plausible reading of her complaint is that such acts and omissions took place in Austria. *See Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009) (reviewing courts must draw on common sense to determine whether a claim for relief is "plausible").

Sachs's remaining claim is based on OBB's alleged failure to warn about the gap between the

platform and the rail cars. This claim is stated broadly enough to constitute a claim of negligent misrepresentation, but the requisite nexus to an alleged act or omission in the United States is lacking. The court in *Sun* expressly distinguished a failure to warn claim from a negligent misrepresentation claim, defining the latter as an *affirmative* duty to disclose "known information concerning prospective dangers." 201 F.3d at 1110 n.2. Sachs' complaint does not allege OBB negligently misrepresented its services by breaching a duty to disclose knowledge of the dangerous train platform conditions *in the United States at the point of sale* of train tickets. Instead, she alleges that there was commercial activity in the United States – OBB's advertising and sale of Eurail passes, both directly and through its agents Eurail and Rail Pass Experts – and then *separately* alleges that she should have been warned about the gap in the platform. To qualify as a negligent misrepresentation claim sufficient to confer jurisdiction under the FSIA under *Sun,* Sachs's complaint would have to allege that OBB should have disclosed, *on the ticket delivered in the United States, in their advertisements broadcast in the United States,* or in some other manner in the United States, of the known dangers of the gap. The facts as pleaded are insufficient to invoke jurisdiction under the FSIA.

I would deny Sachs leave to amend her complaint. As noted above, the *Sun* court remanded that case to allow the district court to review whether the Suns' new claim of negligent misrepresentation was based on commercial activity in the United States

because the Suns "changed their theory of the case in their appellate briefs" from failure to warn in Taiwan, to negligent misrepresentation in the United States. 201 F.3d at 1110. Specifically, the Suns alleged they should have been warned in the advertising done by the Taiwanese government in the United States of the known danger of the treacherous tides at the Taiwanese beach. *Id.* Sachs, conversely, neither changes her theory of the case in her briefs on file to allege negligent misrepresentation in the United States of the dangerous train platform conditions in Austria, under *Sun,* nor requests leave to amend for this purpose, despite prior amendment, and multiple briefs filed in district court.[1]

GOULD, Circuit Judge, dissenting:

The majority decides that the sovereign immunity of OBB Personenverkehr ("OBB"), a national railway of Austria, defeats at the starting gate a domestic forum for a negligence claim by a United States citizen who bought a Eurail pass in the United

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[1] Sachs did request leave to amend to plead facts that would show that the actions of Rail Pass Experts should be imputed to OBB. Had she requested leave to amend to allege that her claim is based on acts or omissions in the United States, this would be a much harder case. However, local rules require that a request for leave to amend must be accompanied by the proposed pleading, and Sachs proposed no amendment that would allege her claim is based on acts or omissions in the United States. N.D. Cal. R. 10-1.

States. Sachs, in California, bought a Eurail pass from Rail Pass Experts, a Massachusetts-based sub-agent of the Eurail Group. The Eurail Group markets and sells rail passes worldwide, including within the United States. OBB is a part-owner of the Eurail Group, and the OBB trains carry Eurail customers in Austria. The Eurail pass permitted Sachs to board an OBB train and to sit in an unoccupied seat. Sachs was seriously injured while trying to board an OBB train in Austria. I believe that, for purposes of sovereign immunity, a sensible interpretation of the FSIA permits a domestic forum in which Sachs may assert her negligence or other claims against OBB, that our Ninth Circuit precedent does not prevent this, and that we should follow the general approach of other federal circuits that have decided in similar cases that ticket sales by an agent in the United States invoked the commercial activity exception to sovereign immunity in cases involving common carriers.

I do not believe that *Doe v. Holy See,* 557 F.3d 1066 (9th Cir. 2009) controls the outcome of this appeal. In *Holy See*, the district court concluded that the FSIA's commercial activity exception to sovereign immunity did not apply to the Holy See's activity, and the district court dismissed Doe's fraud claims alleged under that exception. *Id.* at 1071. Instead, the district court concluded that the Holy See's activity fit within the FSIA's tortious activity exception to sovereign immunity, and the district court denied the Holy See's motion to dismiss all of Doe's remaining claims alleged under the tortious activity exception. *Id.*; *see* 28

U.S.C. § 1605(a)(2) (commercial activity exception), (a)(5) (tortious activity exception).

The Holy See appealed that decision, and Doe cross-appealed the district court's order dismissing his fraud claim alleged under the commercial activity exception. *Holy See,* 557 F.3d at 1071. We declined, however, to consider Doe's commercial activity-based appeal. *Id.* at 1074-75. We concluded that we did not have jurisdiction because Doe's appeal, unlike the Holy See's appeal, did not fall within the collateral order exception to the final judgment rule, and "the tort causes of action [that were relevant to the Holy See's appeal were] not inextricably intertwined with Doe's other claims." *Id.* at 1075. We said:

> In other words, here we would be asked to take up the appeal from that grant and reverse the district court's determination; we would have to reach out and engage in a lengthy disquisition on the commercial activity exception to FSIA, which we neither must nor should do. *Thus, we will not consider issues regarding the district court's grant of immunity under the commercial exception to the FSIA.*

Id. at 1076 (emphasis added).

We went on to extend the presumption in favor of separate juridical status at the liability phase, identified by the Supreme Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611 (1983) ("*Bancec*"), to the jurisdiction phase of the FSIA inquiry. *Holy See,* 557 F.3d at 1079.

We did this even though in an earlier case we explained that "[t]he enumerated exceptions to the FSIA provide the exclusive source of subject matter jurisdiction over civil actions brought against foreign states" and that "*[q]uestions of liability* are addressed by *Bancec,* which examines the circumstances under which a foreign entity can be held substantively liable for the foreign government's judgment debt." *Flatow v. Islamic Republic of Iran,* 308 F.3d 1065 (9th Cir. 2002) (emphasis added).[1]

Because we did not expressly consider the commercial activity exception in *Holy See*, it is not controlling. Because both *Bancec* and *Flatow* deal with separate juridical status for the purposes of liability, neither mandates the majority's approach to resolving this appeal. I would, instead, follow the decisions of the Second Circuit in *Barkanic v. General*

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[1] *Flatow* also does not preclude a ruling in favor of Sachs because our inquiry there, like the Court's in *Bancec,* centered on the question of liability, and not jurisdiction, as permitted under the commercial activity exception to sovereign immunity under the FSIA. *See id.* at 1069 ("The distinction between liability and jurisdiction is crucial to our resolution of this case."). We declined to permit the appellant to levy against real property owned by Bank Saderat Iran ("BSI"), a nationalized bank, in order to satisfy a default judgment against the Republic of Iran. *Id.* at 1066. Relying on *Bancec,* we concluded that Flatow did not allege facts sufficient to overcome *Bancec*'s presumption of separate juridical status at the liability phase. *Id.* at 1074. In short, under the presumption of separate juridical status for the purposes of liability, BSI could not be held liable for the Republic of Iran's obligation to Flatow.

Administration of Civil Aviation of People's Republic of China, 822 F.2d 11 (2d Cir. 1987) and of the D.C. Circuit in *Kirkham v. Société Air France,* 429 F.3d 288 (D.C. Cir. 2005). The courts in *Barkanic* and *Kirkham* expressly considered the commercial activity exception to sovereign immunity under the FSIA in the context of the sale of foreign common carrier tickets in the United States by travel agents. Although there are some distinctions of fact in those cases,[2] I read them to mean in substance that where a foreign common carrier, operated by a sovereign entity, purposefully sells tickets for use of the carrier's services overseas through a domestic sales agent, the ticket sale is commercial activity which may be

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[2] In *Kirkham,* Kirkham bought an airline ticket from a travel agent in Washington, D.C. for travel on Air France in Europe. *Kirkham,* 429 F.3d at 290. Kirkham was injured in a Paris airport while changing planes, and she sued Air France, whose majority shareholder is the Republic of France. *Id.* In *Barkanic,* Barkanic bought a ticket to fly on CAAC, an agent of the People's Republic of China, from a Pan Am-affiliated travel agent in Washington, D.C. *Barkanic,* 822 F.2d at 12. Pan Am and CAAC had previously entered into an agency agreement in which Pan Am was authorized to appoint travel agents to sell seats on CAAC flights. *Id.* Barkanic was killed when his CAAC flight crashed in China, and his survivors filed a wrongful death suit against CAAC. *Id.*

In neither case was the issue of whether the commercial activity (i.e., the sale of the airline ticket in the U.S. by a travel agent) could be imputed to the sovereign raised. Instead the sale of the ticket was attributed to both foreign carriers without dispute between the parties and without suggestion from either the Second Circuit or the D.C. Circuit that to do so was inconsistent with the FSIA's commercial activity exception.

imputed to the foreign common carrier and is sufficient to invoke the commercial activity exception to sovereign immunity under § 1605(a)(2) of the FSIA.

Barkanic and *Kirkham* are consistent with the plain language of the FSIA, which does not require the limitation to jurisdiction under the commercial activity exception relied on by the majority. Section 1605(a)(2) provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case *in which the action is based upon a commercial activity carried on in the United States by the foreign state;* or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2) (emphasis added). "Commercial activity" is defined as "either a regular course of commercial conduct or a particular commercial transaction or act," *id.* at § 1603(d), and a "commercial activity carried on in the United States by a foreign state" is defined as "commercial activity carried on by such state and having substantial contact with the United States." *Id.* at § 1603(e). The legislative history notes that Congress intended the commercial activity exception to apply to "a broad spectrum of endeavor, from an individual commercial transaction

or act to a regular course of commercial conduct." H.R. Rep. 94-1487 at 6614-15.

Here OBB is a member and part owner of Eurail which targets U.S. consumers, selling thousands of passes each year for use on railways, including on OBB, throughout Europe upon one purchase of a pass. That Eurail does this through sub-agents like Rail Pass Experts[3] in the United States does not change that OBB, through Eurail, regularly engages in the type of commercial activity in the United States that Congress intended to defeat sovereign immunity under the FSIA. Indeed, a primary purpose of the Eurail entity is to market and sell in the United States and around the world Eurail passes good only for passage on OBB and other European railways. Stated another way, OBB knew that the Eurail entity, in which it was part owner, would be marketing passes to people like Sachs in the United States. It knew or should be charged with constructive knowledge that Eurail would use sub-agents like Rail Pass Experts to sell tickets to people like Sachs within the United States. *See Phaneuf v. Republic of Indonesia,* 106 F.3d 302, 307-08 (9th Cir. 1997) ("Because a foreign state acts through its agents, an agent's deed

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[3] Before the district court, OBB argued that Rail Pass Experts is not an authorized agent of OBB. OBB acknowledges, however, that OBB is a member of the Eurail Group and that "Rail Pass Experts may be, presumably, a subagent of a general sales agent accredited by The Eurail group and, therefore, able to sell Eurail passes (likely at higher rates than those available from Eurail directly)."

which is based on the actual authority of the foreign state constitutes activity 'of the foreign state' [for the purpose of the commercial activity exception]."). OBB has empowered its agent, the Eurail Group, to sell passes good for travel on OBB trains, including through sub-agents like Rail Pass Experts within the United States. *See id.* Moreover, when a U.S. citizen buys a Eurail pass in the United States for passage on OBB and other railways from an agent in the United States, and then is injured through allegedly improper activity of the foreign railway carrier, like OBB in Europe, such a person should be able to have a forum for suit within the United States so far as sovereign immunity is concerned.

I also believe that Sachs' action is sufficiently "based upon" OBB's commercial activity as is required by the FSIA. 28 U.S.C. § 1605(a)(2). In *Saudi Arabia v. Nelson,* 507 U.S. 349 (1993), the Supreme Court explained that within the context of the FSIA, "the phrase ['based upon'] is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357. Indeed, "[t]he only reasonable reading of ['based upon'] calls for something more than a mere connection with, or relation to, commercial activity." *Id.* at 358.

Here, Sachs' first claim for relief is based on negligence. She alleges that OBB, as a "common carrier for hire," breached its duty of care when Sachs was injured boarding the OBB train in Innsbruck, Austria. This duty arose from the sale of the ticket for

passage on OBB trains, the commercial activity identified by Sachs. *See* Restatement (Third) of Torts § 40(b) (2012) ("Special relationships giving rise to the duty [of reasonable care] include a common carrier with its passengers."). Thus, the commercial activity, on which Sachs argues that the commercial activity exception to sovereign immunity should apply here is a necessary element (i.e., establishment of the duty of reasonable care) that, if proven, would entitle Sachs to relief on a [sic] least some part of her action against OBB. *See Nelson*, 507 U.S. at 358 n.4 ("We do not mean to suggest that the first clause of § 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state.").

A judgment in favor of Sachs is also consistent with our decision in *Sun v. Taiwan*, 201 F.3d 1105 (9th Cir. 2000). In that case, we considered whether the appellants could bring a wrongful death action against Taiwan under the commercial activity exception to sovereign immunity under the FSIA after their son drowned on a Taiwanese beach during a cultural tour of that country. Before the district court, appellants only alleged "a negligent failure to warn and failure to exercise reasonable supervision." *Id.* at 1109. We clarified that the phrase "based upon requires a nexus between the action and the commercial activity." *Id.* We then reasoned that although Taiwan's operation of the tour was commercial activity within the meaning of the FSIA, *id.* at 1108-09, only "administrative promotion and application

management took place in the United States." *Id.* at 1110. Specifically, we said that the basis for the Suns' claims of negligent supervision and failure to warn claims lay in the sovereign's alleged conduct *in Taiwan,* on the Taiwanese beach, and had no nexus with the admitted commercial activity *in the United States*; namely the promotion and sales of tickets for the tour. *Id.* Because "[t]he only conduct relevant to the action was failure to take reasonable care in allowing the students to swim and failure to supervise them," all of which took place in Taiwan, we concluded that the Suns were unable to show a nexus between the action and the commercial activity *within the United States.*[4] *Id.*

Here, by contrast, Sachs' negligence action alleges that OBB breached its common-carrier duty of reasonable care in the operation of its trains, causing her physical harm. As stated above, this duty originates in the commercial activity that Sachs alleges, namely OBB's sale of the train ticket, through its participation in Eurail, which occurred *in the United States.* I would conclude that there is a sufficient

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[4] The Suns then changed their theory of liability on appeal, arguing that under California law, "Taiwan was under an affirmative duty to exercise reasonable care by disclosing known information concerning prospective dangers on the tour and by not misleading prospective participants," while promoting the tour in the United States. *Id.* We then remanded the case to the district court "to review the Suns' claim first in order to determine whether, as currently cast, it is based on commercial activity that took place in the United States." *Id.*

nexus between Sachs' action and the commercial activity. *Accord Barkanic,* 822 F.2d at 13 (concluding that "there is a sufficient nexus between the airplane crash and [the sale of the airline ticket] carried on by [the sovereign] in this country").

Because I believe (1) that the Eurail Group, through ticket sales by its sub-agent Rail Pass Experts, engaged in commercial activity within the United States, and that this activity is fairly attributed to OBB as part-owner of Eurail, carrying its customers in Austria, and (2) that there is a sufficient nexus between that commercial activity and Sachs' action because the ticket sale gave rise to the common carrier duty of reasonable care allegedly breached, I would hold that Sachs has alleged facts sufficient to satisfy the commercial activity exception to sovereign immunity under the FSIA. I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAROL P. SACHS, Plaintiff-Appellant, v. REPUBLIC OF AUSTRIA; OBB HOLDING GROUP; OBB PERSONENVERKEHR AG, Defendants-Appellees.	No. 11-15458 D.C. No. 3:08-cv-01840-VRW Northern District of California, San Francisco ORDER (Filed Dec. 16, 2013)

Before: GOULD, Circuit Judge.

Appellee's Motion to Stay the Mandate Pending Petition for Certiorari is GRANTED. Fed. R. App. P. 41(d).

Therefore, it is ordered that the mandate is stayed pending the filing of the petition for writ of certiorari in the Supreme Court. The stay shall continue until final disposition by the Supreme Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CAROL P SACHS,

Plaintiff,

v

REPUBLIC OF AUSTRIA, OBB HOLDING GROUP, OBB PERSONENVERKEHR AG,

Defendants.
/

No C 08-1840 VRW

ORDER

Defendants the Republic of Austria and OBB Personenverkehr AG ("OBB") move to dismiss the above-captioned action based on, among other things, want of subject matter jurisdiction. Doc ##43 & 51. Plaintiff opposes OBB's motion, Doc #58, but does not oppose Austria's motion, Doc #60. Austria's motion to dismiss, Doc #51, therefore is GRANTED. For the reasons that follow, OBB's motion to dismiss, Doc #43, also is GRANTED.

I

This action arises out of an accident that occurred at a train station in Innsbruck, Austria on April 27, 2007, when plaintiff, while attempting to board a moving train, fell to the tracks and suffered severe injuries which resulted in the amputation of her legs above each knee. Doc ##43 at 10; 58 at 1-2.

On June 21, 2010, defendant OBB moved to dismiss the complaint based on four distinct theories: (i) the court lacks subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 USC §1602 et seq; (ii) the doctrine of forum non conveniens requires dismissal; (iii) the court lacks personal jurisdiction over OBB and (iv) international comity requires abstention. Doc #43. On October 15, 2010, plaintiff opposed the motion. Doc #58. A hearing was held on November 18, 2010. Doc #63.

On November 22, 2010, the court ordered plaintiff to file a supplemental memorandum addressing the court's subject matter jurisdiction under the FSIA. Doc #64. In particular, given that it is undisputed that plaintiff purchased her rail ticket from the Rail Pass Experts (a travel agent in Massachusetts) and not OBB, the court requested briefing on plaintiff's theory that defendant OBB conducted commercial activity in the United States. Id at 2-4. The court also requested briefing on OBB's personal jurisdiction argument. Id at 4. Plaintiff filed a supplemental brief on December 17, 2010, Doc #66, and additional briefing on December 18, 2010, Doc #67. On December 28, 2010, plaintiff filed an ex parte motion for permission to file an exhibit that plaintiff described as "excerpts from the Eurail.com website not to exceed two pages." Doc #68. On January 3, 2011, defendant filed an opposition to plaintiff's ex parte motion, Doc #69, and on January 13, 2011, defendant filed a supplemental brief addressing plaintiff's additional arguments under the FSIA, Doc #70.

II

A

In analyzing OBB's motion to dismiss, the court "assume[s] [plaintiff's factual] allegations to be true and draw[s] all reasonable inferences in [her] favor." *Doe v Holy See,* 557 F3d 1066, 1073 (9th Cir 2009), quoting *Wolfe v Strankman,* 392 F3d 358, 362 (9th Cir 2004). The court need not, however, accept the "truth of legal conclusions merely because they are cast in the form of factual allegations." Id, quoting *Warren v Fox Family Worldwide, Inc*, 328 F3d 1136, 1139 (9th Cir 2003) (emphasis omitted).

B

"In 1976, to clarify the governing standards and to insulate the issue of sovereign immunity from the impact of case-by-case diplomatic pressures, Congress enacted the FSIA, 28 USC §§ 1330, 1602-1611." *Doe*, 557 F3d at 1072 (internal quotations and citation omitted). The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v Amerada Hess Shipping Corp,* 488 US 428, 443 (1989). "Under the FSIA, a foreign state[1] is presumptively immune from

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[1] A foreign state "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 USC § 1603(a). An "agency or instrumentality of a foreign state" means any entity that (i) is a separate legal person, corporate or otherwise, (ii) is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or

(Continued on following page)

suit unless a specific exception applies." *Permanent Mission of India to the UN v City of New York*, 551 US 193, 197 (2007). Here, plaintiff bases her allegation[2] of subject matter jurisdiction on the first clause of section 1605(a)(2), which provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state * * *

28 USC § 1605. The court therefore evaluates whether plaintiff can establish that this exception applies.

C

The parties agree that the only relevant commercial activity within the United States was plaintiff's March 2007 purchase of a Eurail pass from the Rail

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other ownership interest is owned by a foreign state or political subdivision thereof and (iii) is neither a citizen of a State of the United States nor created under the laws of any third country. Plaintiff does not contest that OBB is in fact an organ of the Republic of Austria. See Doc #58.

[2] As OBB points out, after its motion addressed the three clauses of the commercial activities exception, plaintiff, in opposition, argues only that her claim is "based upon OBB's commercial activity in the United States." Doc ##61 at 6; 58 at 2-4. The court therefore limits its analysis to that exception.

Pass Experts, a corporate entity apparently located in Massachusetts. Doc ##1 at 1-2; 58 at 2. Plaintiff argues that because the purchase of the pass occurred in the United States, and her injury claim is based upon that commercial activity, the commercial activity exception applies and the court therefore has subject matter jurisdiction.

The FSIA makes clear, however, that the relevant commercial activity must be undertaken "by the foreign state." 28 USC §1605(a)(2). Plaintiff does not allege that OBB sold her a Eurail pass. Instead, plaintiff lays out the following argument:

> OBB is a member [and owner] of the Eurail Group * * * The [Eurail Group's] website[3] says that the 'Eurail passes are available from our wide network of Sales Agents worldwide' * * * [and] confirms that the Eurail Group represents OBB * * * OBB has authorized the Eurail Group to sell passes directly to American citizens. * * * The issuing office was the Rail Pass Experts in Massachusetts[, which] * * * was the intermediary for the carriers in Europe including the OBB.

Doc #58 at 3. In her supplemental briefing, plaintiff expands on this theory and asserts that OBB authorized Eurail Group, its agent, to sell its railway passes

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[3] While it did not factor into the court's ruling, as a factual matter, plaintiff does not allege that she purchased the rail pass at issue via the internet or from the Eurail Group's website.

and that Eurail Group created a sub-agency relationship with the Rail Pass Experts, which sold the railway pass to plaintiff. Doc #66 at 3-5.

Although plaintiff cites various points of California agency law in support of her theory, the controlling authority in the Ninth Circuit on whether acts by independent entities may be imputed to a foreign government is *Doe v Holy See*, 557 F3d 1066 (9th Cir 2009). In *Doe*, the plaintiff sought to attribute the actions of various entities to the Holy See (a foreign sovereign) for purposes of establishing subject-matter jurisdiction under an exception to the FSIA. Id at 1076-77. The Ninth Circuit adopted the standard articulated in *First National City Bank v Banco Para el Comercio Exterior de Cuba ("Bancec")*, 462 US 611 (1983), to the jurisdictional context of the FSIA. The court observed that "*Bancec* provides a workable standard for deciding" the question whether "a particular individual or corporation is an agent of a foreign state." *Doe*, 557 F3d at 1079. The court confirmed that there is "a presumption in favor of separate juridical status for foreign state instrumentalities at the jurisdiction phase." Id. A plaintiff must allege sufficient facts to overcome this presumption in order to have actions by an independent entity imputed to the sovereign. Applying *Bancec* to the facts of that case, the court found that even though plaintiff had alleged the various instrumentalities were "agents" of the foreign state, "[his] complaint does not allege day-to-day, routine involvement of the [sovereign] in the affairs of the [instrumentalities]";

therefore, plaintiff's allegations were "insufficient to overcome the presumption of separate juridical status." Id at 1079-80.

Other circuits are in accord. For example, in *Transamerica Leasing, Inc v La Republica de Venezuela,* 200 F3d 843, (DC Cir 2000), the DC Circuit examined whether, for purposes of the "commercial activity" exception to the FSIA, the actions of a corporation owned by the defendant Republic of Venezuela could be attributed to the Republic. As in *Doe*, the court held that there is a presumption that a juridical entity has a separate legal status from that of the sovereign. Id at 847. The court ruled that the presumption can only be overcome where "a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created," or "where recognition of the instrumentality as an entity apart from the state would work fraud or injustice." Id at 847-48 (internal quotations omitted). The court rejected the notion that mere "apparent authority" could meet this standard, stating that "[w]e doubt * * * that a case of merely apparent authority falls within the agency exception – an exception limited by its terms to situations in which the instrumentality 'is so extensively controlled by [the sovereign] that a relationship of principal and agent is created.'" Id at 850, quoting *Bancec,* 462 US at 629. Despite the fact that the Republic of Venezuela owned a majority of the corporation's stock, appointed the Board of Directors and President, was involved in certain operations of the corporation and engaged in other activity

related to the corporation, the court concluded that the sovereign did not exercise sufficient control to allow it to be bound by the acts of the corporation for purposes of jurisdiction under the FSIA. Id at 850-55.

Plaintiff's allegations fall far short of meeting these standards. Plaintiff seeks to extend the cases above by imputing the actions of an alleged "sub-agent" (Rail Pass Experts) to a principal (OBB) via an alleged "agent" (Eurail Group). While plaintiff alludes to connections between OBB and the Eurail Group and between the Eurail Group and the Rail Pass Experts, there are no factual allegations or evidence that OBB exerted "day-to-day" control over either Eurail Group or Rail Pass Experts. According to plaintiff, OBB was merely one of many rail carriers that authorized Eurail Group to sell rail passes that would permit passengers to travel over OBB-controlled railways (along with those of the other carriers). Doc #66 at 1. Plaintiff does not dispute defendant's contention that the Eurail Group "has its own management and employees." Doc #43 at 18. Moreover, although OBB acknowledges the possibility that the Rail Pass Experts were a subagent of Eurail Group, plaintiffs have not alleged or argued that (prior to this action) OBB was even aware of the Rail Pass Experts's existence. The mere fact that OBB has authorized the Eurail Group to sell and distribute rail passes for travel over its railways, and that such a pass was sold by a third party travel agent to plaintiff is simply insufficient to establish the day-to-day involvement or "principal-agent" relationship necessary to defeat

the presumption of separate juridical status. *Holy See,* 557 F3d at 1079-80. Indeed, as the court noted in its November 22 order, plaintiff's "unwieldy theory of subject matter jurisdiction would seem to ensnare all thirty members of the Eurail Group." Doc #64 at 4.

The court therefore finds the connection between OBB and the Rail Pass Experts too attenuated to establish subject matter jurisdiction. Because plaintiff fails to establish that the commercial activity here was in fact undertaken by "a foreign state," the commercial activity exception to sovereign immunity does not apply in this case. The court must therefore GRANT OBB's motion to dismiss. Doc #43.

III

Plaintiff also petitions the court for leave to conduct discovery on issues relating to subject matter jurisdiction, "[i]n the event the court is inclined to grant [OBB's] motion." Doc #58 at 8. OBB objects to this request, arguing that its draft answers, Doc #61-1 at 11-13, "show that the answers would not have changed anything." Doc #61 at 16. The court agrees. Plaintiff's proposed interrogatories are not calculated to establish that the commercial activity in question was undertaken by a foreign state or that OBB exerted the "day-to-day, routine involvement" in either the Eurail Group or the Rail Pass Experts that would allow their acts to be imputed to OBB. Hence, the proposed discovery could not possibly alter the court's

conclusion that the commercial activity exception to the FSIA is inapplicable.

Moreover, "it is only if a plaintiff has alleged 'specific facts that, if proved, sustain[ ] a nexus between particularized commercial activity and the claims asserted by the plaintiff' that courts allow limited discovery to confirm those facts: discovery 'cannot supplant the pleader's duty to state those facts at the outset of the case.'" *Dames & Moore v Emirate of Dubai,* 1996 WL 671279, *6 (ND Cal Nov 14, 1996) (Smith, J), quoting *Arriba Ltd v Petroleos Mexicanos,* 962 F2d 528, 537 n17 (5th Cir 1992). Plaintiff's complaint, however, does not allege an agency relationship between OBB and the Rail Pass Experts, or that the Rail Experts is a "foreign state" under the FSIA. See Doc #1 ("Plaintiff * * * purchased the railway ticket through defendants' agent, Eurail, and the American based company, the Rail Pass Experts."). Plaintiff's request for additional discovery is DENIED.

The court also DENIES plaintiff's ex parte request to file additional excerpts from the Eurail Group website. Doc #68. Defendant correctly points out that plaintiff's request was made well past the December 17, 2010 deadline set by the court for further briefing from plaintiff. Doc #64 at 4. Moreover, the court does not see how excerpts from the Eurail Group website could possibly alter the conclusion above. Indeed, plaintiff previously submitted pages from the Eurail Group website that establish, among other things, that the Eurail Group "represents

and acts for the 30 European railway organisations [sic] that make up its membership." Doc #58 at 14. The court does not see how any additional pages from the Eurail Group website would establish that the Eurail Group is "so extensively controlled by [OBB]" – as opposed to its many other member railways – so as to permit the imputation of either the Eurail Group's acts or the acts of the Rail Pass Experts to OBB. *Transamerica Leasing*, 200 F3d at 850.

IV

For the above reasons, defendants' motions to dismiss, Doc ##43 & 51, are GRANTED. Plaintiff's motion for leave to file additional exhibits is DENIED. The clerk is DIRECTED to terminate all motions and close the file.

IT IS SO ORDERED.

/s/ Vaughn R Walker
VAUGHN R WALKER
United States District Judge

§ 1603. Definitions

For purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award

made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub.L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That –

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall

be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same

action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed. Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341

(g) Limitation on discovery. –

(1) In general. – (A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning

on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset. – **(A)** Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would –

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. – The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss. – A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. – Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

OPPOSITION BRIEF

No. 13-1067

IN THE

Supreme Court of the United States

OBB PERSONENVERKEHR AG

Petitioner,

—v—

CAROL P. SACHS

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

An important fact that the petition does not recognize is the court's finding that the sale was ratified.

> "We also agree with Sachs that even if we were to conclude that the sale was originally unauthorized, this ratification of the pass by OBB gives it the 'effect as if originally authorized.' *Rayonier v. Polson,* 400 F.2d 909, 915 (9th Cir. 1968)." Petitioner's Appendix ("Pet.App.") 19-20, footnote 6.

> "Moreover, RPE's actual authority to sell the Eurail pass can be inferred from OBB's sale of the couchette bed upgrade to Sachs. Sachs could purchase the couchette upgrade only if she had a valid Eurail pass. Otherwise, she would have been required to purchase an entirely new ticket, not just an upgrade. If RPE had impermissibly sold the Eurail pass to Sachs, OBB would have not duty to honor the pass. But it did. It cannot now sensibly argue that the sale of that pass by RPE in the United States was unauthorized." Pet.App.19.

The question therefore is whether OBB carried on commercial activity in the United States when it ratified the sale that took place in the United States.

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REASONS TO DENY THE PETITION

I. THERE IS NOT A CONFLICT AMONG THE CIRCUITS AND THE NEED FOR UNIFORMITY WAS RECOGNIZED

Rule 10 of this Court provides that certiorari may be granted where there is conflict among the circuits that ought to be settled. The Ninth Circuit decision does not conflict with any other circuit decision regarding whether the purchase of a ticket from a travel agent in the United States creates a contract of carriage subjecting the state to federal court jurisdiction. In fact, the decision relies on *Barkanic v. General Admin. of Civil Aviation,* 822 F. 2d 11, 13, cert den. 484 U.S. 964 and *Kirkham v. Societe Air France*, 429 F. 3d 288, 290, 291, 295 (D.C. Cir. 2005). The petition will have the court grant certiorari in order to displace years of precedent that a foreign state is not immune from federal court jurisdiction when it enters into a contract of carriage in the United States for travel abroad.

The Ninth Circuit acknowledged that "Congress passed the FSIA to promote uniformity in the treatment of foreign sovereign immunity, and because we think that Congress intended to permit suit in the United States against foreign sovereign common carriers that sell tickets in the United States through agents, we see no compelling reason to create a split with our sister circuits. *See Kelton Arms Condo. Owners Ass'n. v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003) (When a law is

"best applied uniformly, we decline to create a circuit split unless there is a compelling reason to do so."). Pet.App.18.

A. No Conflict with *Nelson's* Definition of "Based On"

The petition suggests that *Saudi Arabia v. Nelson,* 507 U.S. 349, 357 (1993) supports the conclusion that Ms. Sachs' claims are not based on the railway's commercial activity in the United States because the negligence allegedly occurred in Innsbruck. *Saudi Arabia v. Nelson,* 507 U.S. 349, 357. The petition overlooks *Nelson's* reference to *Santos v. Compagnie Nationale Air France*, 934 F. 2d 890, 892-894 (7th Cir. 1991) and the fact that *Santos* cited *Barkanic v. General Admin. of Civil Aviation,* 822 F. 2d 11, 13, cert den. 484 U.S. 964, upon which the Ninth Circuit relied. *Nelson's* definition of "based on" did not alter the thorough explanation of "based on" in *Santos. Santos* explained that in a personal injury case, an element of the claim is that the defendant owed the plaintiff a duty of care. *Id.* at 892-894. Proof of the duty of care is established by showing a passenger-carrier relationship which requires proof that a ticket or pass was purchased. Since proof of the ticket/pass purchase must be made in order for the plaintiff to prevail, the claim is based on the purchase which occurred in the United States. *Id.* at 892-894. In accord is *Kirkham v. Societe Air France*, 429 F. 3d 288, 290, 291, 295 (D.C. Cir. 2005). As clearly stated in *Barkanic*, once the contract of carriage herein was entered into in the United States, there was jurisdiction over the railway. *Id.* at 13.

In *Barkanic* and *Kirkham*, a travel agent over whom the foreign state did not exercise any control, sold the ticket in the United States. Here, the Eurail pass was sold to Sachs in the United States by the Rail Pass Experts. In *Barkanic*, the CAAC honored the contract it had entered into through the agency of Pan American and the Washington, D.C., travel agent by accepting the U.S.–issued tickets for the passage of the decedents on the date in question. *Id.* at 14. The OBB acknowledged that the pass sold by the Rail Pass Experts allowed Ms. Sachs to board the train in Innsbruck and she could not have purchased the couchette upgrade without a valid pass.

II. *BANCEC* IS NOT A RELEVANT DECISION WITH WHICH THIS DECISION CONFLICTS

Rule 10 allows certiorari when the decision conflicts with relevant decisions of this court *Phanuef* pointed out that *Bancec* is not a relevant decision by saying at footnote 3 that "We distinguish the issue here from the inquiry undertaken to determine whether an agency or instrumentality of a foreign state is the 'alter ego' of the foreign state." *Phanuef v. Indonesia* 106 F. 3d 302, 307 (9th Cir. 1997), cert. denied, 535 U.S. 987, *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 627-633, 77 L. Ed. 2d 46, 103 S. Ct. 2591 (1983) ("*Bancec*"). The issue here is not alter ego, the issue is whether a travel agent's sale of the

Eurail pass in the United States is the railway's commercial activity in the United States.

Bancec is also not relevant because it was not a commercial activity case, *Nelson* did not rely on it and *Nelson* certainly suggests, even if it does not specifically hold, that the state may carry on commercial activity through independent businesses not meeting the definition of "agency or instrumentality." *Bancec* is relevant only to the extent that it acknowledges that the FSIA is to be read consistently with principles of equity common to international and federal common law. *Id.* at 613.

III. WHETHER AN AGENT MUST MEET THE DEFINITION OF "AGENCY/ INSTRUMENTALITY" DOES NOT NEED TO BE SETTLED

Rule 10 allows certiorari when the court of appeal has decided an important question of federal law that has not been but ought to be settled by this court. or when the decision conflicts with relevant decisions of this court. Before addressing the argument that an agent of the state must meet the definition of "agency or instrumentality", it is necessary to point out that federal courts have been charged with the responsibility of determining on their own whether they have subject matter jurisdiction even if the parties conceded jurisdiction or made no contention concerning it. *California v. United States,* 215 F.3d 1009, 1015 (9th Cir. 2000) citing *Williamsport Area Sch. Dist.* 475 U.S. 534, 541

(1986). None of the circuits have suggested that OBB's reading is consistent with Congressional intent. 28 U.S.C. § 1602.

Overlooked by the petition is the fact that in *Nelson*, the court did not apply *Bancec* presumably because it was not a commercial activity case. *Saudi Arabia v. Nelson*, 507 U.S. 349. The Saudi Arabian government engaged the services of The Hospital Corporation of America, HCA, for the purpose of recruiting American citizens to work at the government owned hospital. The HCA was an independent corporation established in the Cayman Islands which, pursuant to an agreement with the government, recruited American citizens for employment at the government owned King Faisal Specialist Hospital in Riyad. *Id.* at 351-352. HCA was not an "agency or instrumentality" of the government, it was an independent corporation much like the Eurail Group was OBB's independent marketing arm in the United. As to the recruitment of Nelson by HCA in the United States and whether it was Saudi Arabia's commercial activity in the United States, the court stated, as follows:

> "Although HCA's recruitment of Nelson in the United States might properly be attributed to Saudi Arabia and the hospital, the District Court reasoned, it did not amount to commercial activity "carried on in the United States" for purposes of the Act. *Id.*, at 94-95." *Id* at 354.

Before this court could consider whether the claim in *Nelson* was based on commercial activity in the United States, it had to first be satisfied that

Saudi Arabia had carried on commercial activity in the United States. 28 U.S.C. § 1605(a)(2). The court of appeal in *Nelson* found that the recruitment and hiring were commercial activities of Saudi Arabia and the hospital and this court did not disagree. *Id.* at 355. The only matter about which this court and the court of appeal disagreed was whether the tort claim was "based on" the recruitment. Since the court found that the claim was not based on the recruitment, it necessarily follows that the court agreed the recruitment by HCA was Saudi Arabia's commercial activity.

Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp., 204 F.3d 384, 386 (2nd Cir. 2000) involved a commercial activity case arising from an act performed outside the United States having a direct effect in the United States. 28 U.S.C. § 1605(a)(2). The defendant was an instrumentality of the Republic of China and the plaintiff was a German corporation referred to as TASK. TASK contracted the hiring of its vessels to VSL, which represented itself as the defendant's agent. VSL was not an "agency or instrumentality" of the defendant or the Republic of China. *Id.* at 386. Although the claim was not based on the act, the following language suggests that whether one must be an "agency or instrumentality" in order to carry on commercial activity does not need clarification:

> "Both the questions of whether the effect is enough to meet the statutory requirements and whether the necessary principal-agent relationship exists are complex. But we need not decide them. We will instead

> assume, for purposes of this opinion, that TASK has raised sufficient issues of fact as to each so that at this stage of the proceedings it is appropriate to act as if an 'effect in the United States' exists and as if there were the kind of principal-agent relationship between SFTC and VSL that would make that effect directly attributable to SFTC." *Id.* at 388-389.

In *Phaneuf v. Indonesia* 106 F. 3d 302, 308 (9th Cir. 1997), cert. denied, 535 U.S. 987, the question was whether the agent needed the sovereign's actual or apparent authority for purposes of the commercial activity exception, the Ninth Circuit disagreeing with the Second Circuit's *First Fidelity Bank* decision that apparent authority was sufficient. *First Fidelity Bank N.A. v. Government of Antigua and Barbuda–Permanent Mission*, 877 F. 2d 189 (2nd Cir. 1989). On its own, the Ninth Circuit could have found that the commercial activity exception did not apply even if the state's agent had its actual authority to bind it unless the agent met the definition of "agency or instrumentality" under the FSIA. Likewise, the Second Circuit did not find that an agent with apparent authority to bind the foreign state does not engage in commercial activity on behalf of the state unless the agent is a "agency or instrumentality" of the state. The denial of certiorari in *Phaneuf* certainly suggests that whether one must be an "agency or instrumentality" in order to be an "agent" is settled.

The sale in *Barkanic* was made by a Washington D.C. travel agent authorized by Pan Am to issue the

ticket and the sale herein was made by a Massachusetts travel agent authorized to issue the pass by the Eurail Group. Barkanic inferentially settles the issue relating to whether for purposes of the commercial activity exception, an agent must be an "agency or instrumentality" of the state. The CAAC in *Barkanic* was established by the Chinese government and it was authorized to arrange for transportation and to provide for it in China and the United States. *Id.* at 12. The arrangement for Barkanic's travel in China was not made by CAAC, it was made by its agents, Pan Am and the travel agent in Washington D.C. *Id.* at 12. Although CAAC was an agent of the state, Pan Am and the travel agent in Washington D.C. were not. CAAC honored the contract it had entered into through the agency of Pan American and the Washington, D.C., travel agent by accepting the U.S.-issued tickets for the passage of the decedents on the date in question. *Id.* at 14. Certiorari was denied in *Barkanic* presumably because the court was satisfied that the sale in the United States by the agency of Pan Am and the Washington D.C. travel agent established FSIA jurisdiction even though they were not an "agency or instrumentality" of the CAAC. *Barkanic v. General Admin. of Civil Aviation,* 822 F. 2d 11, 13 (2nd. Cir. 1987), cert den. 484 U.S. 964.

IV. OBB'S RATIFICATION MADE THE SALE ITS OWN

The Ninth Circuit concluded that OBB ratified the sale by RPE. Pet.App.20, footnote 6. When the ratification occurred, the sale in the United States became OBB's sale in the United States subjecting it to federal court jurisdiction. This decision does not need to be reviewed because it is entirely consistent with the definition of "commercial activity". (A commercial activity means either a regular course of commercial conduct or a particular commercial transaction or act). OBB's ratification sufficiently meets the definition of commercial transaction or act. Although OBB did not directly participate in the commercial transaction relating to the sale of the pass to Sachs, it engaged in a commercial act when it ratified the commercial transaction between RPE and Sachs.

The petition does not address what impact ratification has on the commercial activity exception presumably because OBB believes the common law of agency/ratification does not apply notwithstanding that fact the FSIA has its roots in the common law. Pet.App.10. Granting certiorari is not necessary to review whether RPE had to be an "agency or instrumentality" of OBB because when OBB ratified the sale it was as if OBB made the sale itself. Therefore, there is not a pressing need to decide the esoteric question as to whether OBB is exempt from the commercial activity exception unless the commercial activity is carried on by its "agency or instrumentality" The Ninth Circuit's conclusion regarding ratification and its impact on the

commercial activity exception is consistent with Congress' Findings and Declaration of Purpose in enacting the FSIA. 28 U.S.C. § 1602,

> "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activity is concerned "

OBB does not suggest that under international law, when a state ratifies commercial activity it nevertheless is immune from jurisdiction of foreign courts. Nevertheless, it is asking for a grant of certiorari in order for this court to find that under the FSIA, the commercial activity exception does not apply even when the state ratifies commercial activity carried on in the United States for its benefit. Omitted from the petition is reference to The Findings and Declaration of Purpose which shows that the Congressional intent was not merely to devise standards to protect foreign states and their immunity claims. Allowing the court to determine jurisdiction under the FSIA was intended to protect the foreign state and litigants seeking access to the federal court. The Findings and Declaration of Purpose state the following:

> "The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts . " 28 U.S.C. § 1602.

OBB disagrees that Congress contemplated that the sale of tickets by travel agents within the United States for passage on foreign-sovereign owned common carriers would constitute commercial activity carried on in the United States by the foreign state. Pet.App.26-27. OBB's position, the court said, "would negate the possibility of commercial activity by a state-owned railway or airline within the United States through a travel agent. We cannot believe that is what Congress intended." Pet.App.25. OBB says that the court offered no basis for this belief but it did when it relied on *Barkanic* and *Kirkham*. In response to the court's statement that "There is no reason to think that Congress intended such a chaotic result," OBB offered the following:

> "For example, if a foreign carrier undertakes to transport a passenger from or to the U.S., the carrier would have engaged in commercial activity 'in' the U.S. and be subject to suit here." Brief of Petitioner 21.

OBB's statement erroneously suggests that the mere undertaking of transport from or to the U.S. creates jurisdiction. It does not unless the undertaking occurred in the United States and there is the required nexus between the claim and the activity. If the undertaking occurred in Austria and the accident occurred there, there would not be jurisdiction even though transport to the United States was provided. Likewise, if the undertaking occurred in Austria and the accident occurred in the United States, jurisdiction might be based on act performed in the United States in connection with a commercial activity of the foreign state elsewhere but

it would not be based on the commercial activity exception. 28 U.S.C. § 1605(a)(2). In order for there to be jurisdiction under the commercial activity exception, there must be commercial activity in the United States and the claim must be based upon the commercial activity. 28 U.S.C. 1605 (a)(2).

CONCLUSION

For many years, the FSIA has been interpreted as allowing jurisdiction when the foreign state sells a ticket in the United States providing for travel that begins and ends abroad. *Barkanic v. General Admin. of Civil Aviation,* 822 F. 2d 11, 13, cert den. 484 U.S. 964. Accordingly, the petition ought to be denied.

Respectfully Submitted,

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April 2, 2014

REPLY BRIEF

No. 13-1067

In The Supreme Court of the United States

OBB PERSONENVERKEHR AG,

Petitioner,

v.

CAROL P. SACHS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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RULE 29.6 STATEMENT

The petitioner is OBB Personenverkehr AG ("OBB"), an organ of a foreign state, the Republic of Austria. Pursuant to Supreme Court Rule 29.6, OBB's stock is wholly held by OBB Holding, a joint-stock company organized under Austrian law and created by the Republic of Austria pursuant to the Austrian Federal Railways Act. The sole shareholder of OBB Holding is the Austrian Federal Ministry of Transport, Innovation and Technology.

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REPLY TO BRIEF IN OPPOSITION

The Ninth Circuit's *en banc* opinion radically expands U.S. jurisdiction over foreign state-owned common carriers, and Respondent's Opposition only underscores the importance of this Court's review of the questions presented by this Petition. If allowed to stand, the *en banc* opinion would permit a foreign state-owned carrier to be dragged into U.S. court for any injury to a passenger occurring in the foreign state on the sole basis that the subject ticket was purchased within the United States or from a U.S.-based travel agency – even if the ticket was for travel entirely outside the United States and no matter how attenuated or non-existent the relationship between the ticket seller and foreign carrier. As explained in the Petition, this holding is in conflict with the statutory text and purposes of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* ("FSIA"), as well as this Court's holding in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

Moreover, the *en banc* opinion is inconsistent with this Court's recent holdings in *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014), *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011), and *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011). Those decisions reined in U.S. jurisdiction over foreign corporations; indeed, under those decisions, Petitioner would *not* be subject to jurisdiction if it were privately owned. The *en banc* opinion, in contrast, expands jurisdiction over foreign states, and, if allowed to stand, will mean that jurisdiction over

foreign *states* will be broader than that over foreign *private entities*. Such a holding is in tension with this Court's jurisprudence, and is contrary to the limited nature of the commercial activity exception to sovereign immunity that Congress enacted in the FSIA, thus requiring this Court's immediate attention.

Review of the *en banc* opinion is also important because of the negative reaction it is likely to engender from foreign states, as explained by the separate *amicus* briefs submitted by the Kingdom of the Netherlands and International Rail Transport Committee ("CIT"). The *en banc* opinion creates a danger of adverse foreign policy consequences such as retaliatory jurisdiction, and "create[s] a substantial risk of jurisdictional and diplomatic conflict." Netherlands *Amicus* Brief at 2. As this Court stated in *Daimler*, the Ninth Circuit's expansive views of general jurisdiction have "impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." *Daimler*, 134 S.Ct. at 763. Further, the *en banc* opinion also will have a negative impact on U.S. citizens traveling abroad, because, as CIT highlighted, foreign railways will respond by "alter[ing] their business and ticketing practices in ways that will undoubtedly inconvenience American travelers." CIT *Amicus* Brief at 16.

Accordingly, review by this Court is necessary in order to resolve these important jurisdictional issues affecting foreign state-owned carriers and U.S.-based customers of their services. The broad accessibility of

foreign services in the internet further underscores the timeliness of this Petition.

I. RESPONDENT'S OPPOSITION HIGHLIGHTS THE NEED FOR THIS COURT TO GRANT CERTIORARI AS TO WHAT CONSTITUTES "COMMERCIAL ACTIVITY CARRIED ON IN THE UNITED STATES BY THE FOREIGN STATE."

Respondent's Opposition distorts the first question presented to this Court, the splits in the Circuits and the departure from the FSIA created by the *en banc* opinion. While Congress enacted the FSIA to promote uniformity in the treatment of foreign sovereign immunity, uniformity is undermined by the *en banc* opinion's application of common law principles – which vary from state to state – to determine when a person or entity is acting as an agent of a foreign state. The *en banc* opinion also destroys uniformity by creating a circuit split as to what commercial activity "*by a foreign state*" means under the FSIA. Moreover, the cases cited by the *en banc* opinion and Respondent did not address the "by a foreign state" component of the commercial activity exception, and did not expand the scope of the exception as the *en banc* opinion has done. Finally, Respondent's reliance on a passing footnote in the *en banc* opinion concerning "ratification" does not negate the need for this Court's review. To the contrary, if ratification were the test, it would swallow the rule of immunity under the FSIA, creating jurisdiction over the foreign sovereign whenever the ticket sale occurred in the United States.

A. The *En Banc* Opinion's Reliance on Common Law Agency Principles Conflicts with the Statutory Language and Decisions of this Court and Other Circuits.

Respondent does not dispute that the *en banc* opinion's application of common law agency principles to the requirement that the "commercial activity [be] carried on in the United States *by the foreign state*" conflicts with the statutory definitions of "foreign state" and "agency or instrumentality of a foreign state" in the FSIA. In fact, Respondent openly argues that "foreign state" means something *other* than the statutory definition in the FSIA. Opposition at 4-8. But none of the cases from this Court and other circuits cited by Respondent support that proposition because they did not address the question of what it means to be an agent of the foreign state under the FSIA's commercial activity exception.

For example, Respondent relies upon *Saudi Arabia v. Nelson*, but "[t]here [was] no dispute [t]here that Saudi Arabia, the hospital, and Royspec all qualify as 'foreign state[s]' within the meaning of the Act." *Nelson*, 507 U.S. at 356. And, Respondent concedes the same with respect to *Transatlantic Shiffahrstskontor GmbH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 386 (2d Cir. 2000). Opposition at 6. Likewise, *Barkanic v. Gen. Admin. of Civil Aviation of the Peoples Rep. of China*, 822 F.2d 11 (2d Cir. 1987), as noted by Judge O'Scannlain in his dissent,

did not "analyze when acts of agents can be attributed to a foreign state." Pet. App. at 57.

Respondent's Opposition also fails to address this Court's holdings that the *FSIA* is the "*sole basis* for obtaining jurisdiction over a foreign state in our courts," *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (emphasis added), and that the FSIA's definition "*specifically delimits* what counts as an 'agency or instrumentality,'" *Samantar v. Yousuf*, 560 U.S. 305, 314 (2010) (citing Section 1603(b)) (emphasis added). Similarly, the Fifth and Eleventh Circuits have held that the FSIA – not common law – defines who is an "agent" of a foreign state. *See Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480 (5th Cir. 1998) ("The FSIA includes agents or instrumentalities of a foreign state within the definition of 'foreign state.'") (emphasis added); *S & Davis Intern., Inc. v. The Republic of Yemen*, 218 F.3d 1292, 1300 (11th Cir. 2000) (same). Review by this Court is required to resolve the *en banc* opinion's disregard of *Samantar* and departure from the FSIA's statutory definition.

B. The Authorities Cited by Respondent Also Do Not Negate the Existence of a Circuit Split Concerning Application of *Bancec* to the "By the Foreign State" Requirement.

In determining whether an entity is an "agent" of a "foreign state" under the FSIA, other circuits have applied the factors in *First Nat'l City Bank v. Banco*

Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983) ("*Bancec*"). *See Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533-534 (5th Cir. 1992) ("Although Bancec's description of the basis for disregarding the separate juridical status of foreign agencies occurred in a discussion of substantive liability, *its principles have been applied to FSIA jurisdictional issues*. [Citations.] Hence, where .. jurisdiction depends on an allegation that the particular defendant was an agent of the sovereign, the plaintiff bears the burden of proving this relationship.") (emphasis added); *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 847-848 (D.C. Cir. 2000) (same). The *en banc* opinion's newly minted circuit split is in stark contrast with its prior holding that "*Bancec* provides a workable standard for deciding" the question whether "a particular individual or corporation is an agent of a foreign state." *Doe v. Holy See*, 557 F.3d 1066, 1079 (9th Cir. 2009) (*per curiam*), *cert. denied,* 130 S.Ct. 3497 (2010). As Judge O'Scannlain noted in dissent, "[o]ur opinion in *Holy See* provides the proper standard for attributing the actions of third parties to foreign states." App. at 51. As Judge O'Scannlain further noted, "it is clear that the sort of agency relationship that *Bancec* and *Holy See* required for the imputation of actions to the foreign state (an alter ego relationship, for example) differs significantly from the all-authorized-agents standard adopted by the majority." *Id.*

Respondent's contention that the *en banc* opinion does not create a circuit split because it is purportedly

consistent with *Barkanic, supra*, and *Kirkham v. Societe Air France*, 429 F.3d 288 (D.C. Cir. 2005), is incorrect. *See* Opposition at 1. As Judge O'Scannlain observed, "the parties in *Barkanic* and *Kirkham* did not dispute that the relevant actions constituted activity of the foreign state." Pet. App. 57. There was no holding in those cases as to the meaning of "agent." "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." Pet. App. 57 (quoting *Arizona Christian School Tuition Organization v. Winn*, 131 S.Ct. 1436, 1448 (2011)). This Court should resolve the circuit split caused by the *en banc* opinion.

C. Common Law Principles of Ratification Do Not Apply to the FSIA, and Their Application Would Lead to Unwanted Results.

Respondent tries to salvage the *en banc* opinion's holding by arguing that a passing footnote concerning agency "ratification" principles dictates the result in this case. *See* Opposition at i (quoting Pet. App. 19-20 n.6). This footnote was not part of the court's holding and, in any event, the concept of ratification has no application to the FSIA or under these facts.

Ratification is a concept from agency common law. Indeed, the case cited by the *en banc* majority in support of its "ratification" theory, *Rayonier, Inc. v. Polson*, 400 F.2d 909, 915 (9th Cir. 1968), relies upon

the Restatement (Second) of Agency and Washington State common law. But "ratification" has no grounding in the FSIA, and the *en banc* majority's reference to state common law principles only exacerbates its departure from the need for uniformity that resulted in the FSIA's enactment.

Moreover, the *en banc* opinion's application of ratification will, with respect to foreign state-owned carriers, swallow the rule of sovereign immunity under the FSIA. When a carrier honors a ticket, it does not necessarily know where, or from what travel agency, that ticket was purchased. Here, for example, OBB was not even aware that ticket seller RPE existed. Yet under the *en banc* majority's reasoning, any time a foreign state-owned carrier such as OBB honors the ticket of a passenger, it has "ratified" that ticket and given it "effect as if originally authorized," thereby subjecting itself to the jurisdiction of U.S. courts if it turns out that the ticket sale has some connection to the United States. The notion that a foreign sovereign essentially waives sovereign immunity every time it honors a ticket with a U.S connection – whether known or unknown – has no basis in the FSIA or the cases interpreting the FSIA.

Such a "ratification" theory would also likely lead foreign state-owned carriers to alter their ticketing policies in ways that will lead to expense and trouble for U.S. citizens traveling abroad. If OBB had refused to honor Respondent's ticket and forced her to buy a new ticket when she arrived in Austria, OBB would not be subject to U.S. jurisdiction since that would

not be "commercial activity *carried on in the United States* by the foreign state." As CIT identified in its *amicus* brief, European railways are likely to change their business practices in response to the *en banc* opinion in order to avoid exposure to U.S. jurisdiction, and such changes "are likely to make it more inconvenient for Americans to purchase international railway passage." CIT *Amicus* Brief at 3, 16. Review by this Court is necessary, given the serious foreign relations and business considerations at stake.

II. THE *EN BANC* OPINION'S HOLDING THAT A PERSONAL INJURY CLAIM ARISING FROM A FOREIGN TRAIN ACCIDENT IS "BASED UPON" THE SALE OF A TICKET IN THE UNITED STATES CONFLICTS WITH *SAUDI ARABIA V. NELSON* AND IS AN UNPRECEDENTED EXPANSION OF FSIA JURISDICTION OVER FOREIGN SOVEREIGNS.

Concerning the commercial activity exception's "based upon" requirement, Respondent offers no response to Chief Justice Kozinski's dissent that the *en banc* majority's decision "conflict[s] with Supreme Court precedent" in *Saudi Arabia v. Nelson*. This conflict further compels review by this Court.

Nor does Respondent make any effort to reconcile the *en banc* majority's holding with *Nelson*. Instead, Respondent argues that there is no conflict because "the petition overlooks *Nelson's* reference to *Santos v. Compagnie Nationale Air France*, 934 F.2d 890,

892-894 (7th Cir. 1991) and the fact that *Santos* cited *Barkanic v. General Admin. of Civil Aviation*, 822 F.2d 11, 13, *cert. den.*, 484 U.S. 964, upon which the Ninth Circuit relied." Opposition 2. But it is what *this Court* said in *Nelson* ("Those torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons' suit." *See* 507 U.S. at 358) that is the law. Applying *Nelson*, the claims here are "based upon" the alleged torts that occurred in Austria, and not on the ticket sale from a U.S.-based ticket seller months earlier.

Moreover, there is division in the circuit courts as to what the "based upon" standard means post-*Nelson*. The *en banc* majority, for example, "require[es] that only *'an element'* of the claim consist of such [commercial] activity." App. 62. In contrast, the Second Circuit, in *Kensington Intern. Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007), has held that the "based upon" element requires a "degree of closeness between the acts giving rise to the cause of action and those needed to establish jurisdiction that is *considerably greater* than *common law* causation requirements." *Id.* at 156 (emphasis in the original). The Eighth Circuit, employing yet another test, has held that the relevant inquiry is where the commercial activity "primarily" took place. *See Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1382-1384 (8th Cir. 1993). The Eleventh Circuit focuses on "the conduct which forms the basis of [the] complaint." *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1312-1313 (11th Cir. 2009). And, the Fifth Circuit relies on a confusing

combination of tests. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985) ("[T]he focus should be on the elements of the cause of action itself: Is the gravamen of the complaint a sovereign activity by the defendant?"); *Can-Am Intern., LLC v. Republic of Trinidad and Tobago*, 169 Fed. Appx. 396, 405 (5th Cir. 2006) ("The court must therefore focus only on the conduct on which [the] action is based.").

It is important that this Court resolve these divisions and confusion as to the test for the "based upon" requirement particularly given the international impact of the *en banc* opinion. In addition to making no sense,[1] the *en banc* opinion's use of the "elements only" test dramatically expands jurisdiction over foreign state-owned carriers, finding jurisdiction based solely on the sale of a ticket in the United States *by anyone* (because, according to the *en banc* majority, *anyone* becomes an agent of the foreign carrier that honors the ticket), regardless of the location of the accident or absence of contacts between the carrier and the United States.

The need for this Court to accept review is pressing given this Court's concerns regarding courts in general, and the Ninth Circuit in particular,

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[1] Respondent's claim is based upon "commercial activity" in Austria – Petitioner's provision of train services – not on the sale of the ticket in the United States. The ticket was not deceptive, overpriced or flawed in some way that gave rise to the claim. The ticket could have been sold anywhere in the world, and the claim would still be based upon the accident in Austria.

overstepping their bounds and subjecting foreign corporations to jurisdiction. *See, e.g., Daimler*, 134 S.Ct. at 759-760 (rejecting Ninth Circuit's common law of agency-based theory of jurisdiction). While the Court has reined in the Ninth Circuit's over-reaching in the area of jurisdiction over foreign *corporations*, the *en banc* opinion, if permitted to stand, would impose a similar "expansive view" of jurisdiction over foreign states, with "little heed to the risks to international comity." *Id.* at 763. This means that jurisdiction over foreign *states* would be broader than over foreign *private entities*, an anomaly contrary to the limited exceptions to sovereign immunity enacted in the FSIA.

CONCLUSION

The Ninth Circuit's expansion of subject matter jurisdiction over foreign state-owned carriers should not remain the law. For the foregoing reasons, the Petition for a writ of certiorari should be granted.

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April 15, 2014

AMICUS CURIAE BRIEF

No. 13-1067

In the Supreme Court of the United States

OBB PERSONENVERKEHR AG, PETITIONER

v.

CAROL P. SACHS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.*, provides that foreign states and their instrumentalities are generally immune from suit in U.S. courts, subject to limited statutory exceptions. The commercial activity exception, 28 U.S.C. 1605(a)(2), gives U.S. courts jurisdiction over claims that are "based upon a commercial activity carried on in the United States by the foreign state." The questions presented are:

1. Whether the court of appeals correctly held that common-law agency principles may be used to determine whether the acts of a separate entity are attributable to a foreign state for purposes of Section 1605(a)(2).

2. Whether the court of appeals correctly held that respondent's claims are "based upon" commercial activity carried on in the United States.

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In the Supreme Court of the United States

No. 13-1067

OBB PERSONENVERKEHR AG, PETITIONER

v.

CAROL P. SACHS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA or the Act), 28 U.S.C. 1330, 1602 *et seq.*, establishes "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). Section 1604 provides that a foreign state is "immune from the jurisdiction of the courts of the United States" unless the suit falls within one of the narrow exceptions to im-

munity set forth in the Act. 28 U.S.C. 1604; see 28 U.S.C. 1330. The "commercial activity" exception, which is at issue in this case, provides in relevant part that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2).

Section 1603 defines a "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined by subsection (b)." 28 U.S.C. 1603(a). Subsection (b) then defines an "agency or instrumentality of a foreign state" as "any entity" that is (1) a "separate legal person"; (2) "an organ of a foreign state or political subdivision thereof," or an entity that is majority-owned "by a foreign state or political subdivision thereof," and (3) "neither a citizen of a State of the United States * * * nor created under the laws of any third country." 28 U.S.C. 1603(b).

2. a. Petitioner OBB Personenverkehr AG (OBB), which operates passenger rail service within Austria, is an entity wholly owned by OBB Holding Group, a joint-stock company created by the Republic of Austria and wholly owned by the Austrian Federal Ministry of Transport, Innovation, and Technology. Petitioner is a member of the Eurail Group, an association responsible for marketing and selling Eurail passes, which authorize passenger transit on the railways of member countries. Pet. App. 5.

Respondent is a California resident who purchased a Eurail pass over the Internet from Rail Pass Experts (RPE), a travel agent in Massachusetts. Pet.

App. 5, 44. In April 2007, respondent presented her Eurail pass to petitioner in Innsbruck, Austria, for travel to Prague. *Id.* at 6. When attempting to board the train, respondent suffered injuries that ultimately required amputation of both her legs above the knee. *Ibid.*

b. Respondent sued petitioner in the United States District Court for the Northern District of California, asserting claims for negligence, strict liability for design defects and for failure to warn of design defects, and breach of implied warranties of merchantability and fitness. Pet. App. 6.

The district court dismissed the suit for lack of subject matter jurisdiction under the FSIA. Pet. App. 101-111. The court concluded that the FSIA's commercial activity exception to immunity did not apply because petitioner itself had not engaged in commercial activity in the United States, and RPE's sale of the Eurail pass could not be attributed to petitioner. *Id.* at 108-109. The court did not address the other grounds on which petitioner argued the suit should be dismissed, including *forum non conveniens*, lack of personal jurisdiction, and international comity. See *id.* at 102.

3. A panel of the court of appeals affirmed. Pet. App. 67-85. The panel held that RPE's sale of the rail pass could not be attributed to petitioner because respondent had not established that RPE's "separate juridical status" should be disregarded under the alter-ego test set forth in *First National City Bank* v. *Banco para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*Bancec*). Pet. App. 76; see *id.* at 73-78.

4. The court of appeals granted rehearing en banc and reversed the district court's dismissal of the ac-

tion. Pet. App. 1-66. The court of appeals held that respondent's claims are "based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. 1605(a)(2), and therefore petitioner is not immune from suit. Pet. App. 40-41.

a. The court first held that a foreign state may "carr[y] on" commercial activity in the United States within the meaning of Section 1605(a)(2) if the state acts through entities whose actions are attributable to the foreign state "[u]nder traditional agency principles," so long as the agent (or subagent) was acting with actual authority. Pet. App. 15. The court concluded that "RPE is a subagent of [petitioner] through Eurail Group," and therefore "RPE's act of selling the Eurail pass to [respondent] within the United States can be imputed to [petitioner] as the principal." *Id.* at 18.

The court of appeals rejected petitioner's argument that before an entity's conduct may be attributed to a foreign state, the entity must satisfy Section 1603(b)'s definition of "agency or instrumentality." Pet. App. 21-30. The court explained that Section 1603(b) "defines what type of entity can be considered a foreign state for purposes of claiming sovereign immunity," but does not address the situations in which an entity's acts can be attributed to the foreign state. *Id.* at 22; see *id.* at 22-23. The court also rejected petitioner's argument that an entity's acts may be attributed to a foreign state only if the entity's separate juridical status should be disregarded under *Bancec*. See *id.* at 20-21. The court reasoned that *Bancec* did not establish the exclusive means by which an entity's actions could be attributed to a foreign state, and that *Bancec*'s alter-ego inquiry was not relevant in the

context of entirely distinct entities like petitioner and RPE. See *ibid.*

b. The court of appeals next concluded that respondent's claims are "based upon" petitioner's commercial activity in the United States. Pet. App. 32-40. The court explained that this Court held in *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993), that "based upon" is "read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief." Pet. App. 32-33 (quoting *Nelson*, 507 U.S. at 357). The court further explained that, under Ninth Circuit precedent, a claim is "based upon" commercial activity if "an element" of the claim consists of commercial activity carried on in the United States, or if the commercial activity in the United States is an "essential fact" that the plaintiff must prove in order to establish an element of her claim. *Id.* at 33, 35 (emphasis omitted). The court concluded that California law applies to respondent's claims, *id.* at 34 n.14, and that the sale of the Eurail pass in the United States was an essential fact for purposes of each of respondent's claims, *id.* at 33-40. In particular, the court reasoned that respondent's purchase of the Eurail pass established a common-carrier/passenger relationship. *Id.* at 34-35.

c. Judge O'Scannlain, joined by Chief Judge Kozinski and Judge Rawlinson, dissented. Pet. App. 42-61. The dissenting judges argued that an entity's actions may be attributed to a foreign state only if the entity's separate form should be disregarded under *Bancec*, and that respondent had not satisfied that standard. *Id.* at 45-58. They also argued that respondent's strict liability claims are not "based upon"

the rail pass sale because they did not require proof of a transaction. *Id.* at 58-61.

Chief Judge Kozinski, in a separate dissent, concluded that none of respondent's claims were "based upon" commercial activity carried on in the United States. Pet. App. 65; see *id.* at 61-66.

DISCUSSION

Petitioner challenges the court of appeals' conclusions that (1) common-law agency principles may be used to attribute an entity's actions to a foreign state for purposes of the commercial activity exception; and (2) respondent's claims are "based upon" commercial activity—*i.e.*, the sale of the Eurail pass—in the United States. Further review is not warranted with respect to either question.

The court of appeals correctly held that the commercial activity exception encompasses situations in which a foreign state carries on commerce through the acts of an independent agent in the United States. That ruling does not conflict with any decisions of this Court or other courts of appeals.

The court of appeals' holding that respondent's claims are "based upon" commercial activity in the United States also does not warrant review. Although the court used an overly permissive formulation of the "based upon" standard, this case is not an appropriate vehicle in which to address the meaning of that standard. The court's and the parties' analysis of questions that are antecedent to the "based upon" inquiry—namely, whether California law governs respondent's claims, and, even if it does, how the sale of the Eurail pass relates to each claim under California law—was cursory and incomplete. The resulting lack of clarity about the precise nature of

respondent's claims would make it difficult to provide guidance on the content of the "based upon" requirement by applying it to the claims in this case. In addition, the district court on remand may dismiss the case on other grounds, and cases presenting similar claims are unlikely to recur with any frequency, in light of the prevalence of forum-selection clauses in form ticket contracts for travel.

I. THE COURT OF APPEALS' HOLDING THAT A FOREIGN STATE MAY CARRY ON COMMERCIAL ACTIVITY IN THE UNITED STATES THROUGH THE ACTS OF AN AGENT ACTING ON ITS BEHALF DOES NOT WARRANT REVIEW

The court of appeals correctly held that a foreign state may be found to have "carried on" commercial activities in the United States when it has employed an entity to act as its agent in conducting those activities. Pet. App. 14-17. That holding does not conflict with any decision of this Court or another court of appeals.

A. 1. The FSIA's commercial activity exception provides in relevant part that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2); see 28 U.S.C. 1603(e) (defining the latter phrase as commercial activity "carried on by such state and having substantial contact with the United States"). The FSIA does not further explain what it means for commercial activity to be "carried on" by a foreign state. Applying traditional agency-law principles to give content to that phrase best furthers Congress's intent in enacting the exception.

The commercial activity exception is designed to ensure that when a foreign state acts as an "every day participant[]" in the marketplace—in other words, when the state engages in commercial ventures of the sort that private parties undertake—plaintiffs may seek judicial resolution of any resulting "ordinary legal disputes." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6-7 (1976) (*House Report*); *id.* at 17 (examples of disputes that would fall within the exception include "business torts occurring in the United States"). Private parties often engage in commercial activities with the assistance of agents whose conduct they direct and control. As a result, common-law agency principles are routinely applied in private commercial disputes: for purposes of both jurisdiction and liability, agency principles may provide a basis for attributing the conduct of one party to a principal who directed the activity at issue. See Restatement (Third) of Agency § 1.01 cmt. c (2006); *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 759 n.13 (2014) (acts of agent may be imputed to principal for purposes of exercising specific jurisdiction).

Congress therefore would have expected traditional agency-law principles to play a similar role in determining when a foreign state has undertaken commercial activities that subject it to suit. Foreign states, like private actors, may often engage in commercial activities by employing entities under their direction and control to enter into and execute transactions. See *Maritime Int'l Nominees Establishment* v. *Republic of Guinea*, 693 F.2d 1094, 1105 (D.C. Cir. 1982), cert. denied, 464 U.S. 815 (1983). When a foreign state uses agents to accomplish its commercial ends, the state is acting as an "every day partici-

pant[]" in the marketplace. *House Report* 7. And by virtue of the state's direction and control over the agent, the state is effectively taking actions in the United States commercial market itself. Applying agency-law principles to determine when a foreign state has "carried on" commercial activity therefore furthers Congress's purpose of ensuring that foreign states may be subject to suit when they act in a commercial manner.[1] See *Maritime Int'l*, 693 F.2d at 1105; see also *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 372-373 (1993) (Kennedy, J., concurring in part and dissenting in part) (actions of private entity acting as agent of Kingdom of Saudi Arabia could be attributed to Kingdom); U.S. Amicus Br. at 14 n.8, *Nelson*, *supra* (No. 91-522).

Exercising jurisdiction over a foreign state that has "carried on" commercial activity through an agent is also consistent with international practice. The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, a draft convention describing well-accepted state practice in this respect, provides that "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is *in fact acting on the instructions of, or under the direction or control of, that State* in

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[1] The *House Report*'s discussion of a different prong of the commercial activity exception, which denies immunity for "act[s] performed in the United States in connection with a commercial activity of the foreign state elsewhere," 28 U.S.C. 1605(a)(2), reinforces the conclusion that Congress expected that foreign states could be subject to suit based on the acts of their authorized agents. The *House Report* (at 19) explains that "a representation in the United States by an agent of a foreign state" could constitute an "act performed" by a foreign state.

carrying out the conduct." G.A. Res. 56/83, Pt. 1, ch. II, art. 8, U.N. Doc. A/RES/56/83, at 3 (Jan. 28, 2002) (emphasis added). The United States expressed support for an earlier, materially similar draft article. State Responsibility: Comments and observations received from Governments, U.N. Doc. A/CN.4/488, at 41 (Mar. 25, 1998).

2. Petitioner's arguments against applying traditional agency principles are without merit.

a. Petitioner first argues (Pet. 17-19) that an entity's acts may be considered acts of the foreign state only if the entity falls within the statutory definition of an "agency or instrumentality of a foreign state" in 28 U.S.C. 1603(b).

As the court of appeals explained, Section 1603(b) defines entities that qualify as an "agency or instrumentality of a foreign state" for purposes of the FSIA. Pet. App. 22-23. Section 1603(a) provides that a "foreign state" includes the state itself, its political subdivisions, and any "agency or instrumentality" of the state, as defined in Section 1603(b). 28 U.S.C. 1603(a). Section 1604 then provides that a "foreign state" is presumptively "immune from the jurisdiction of the courts." 28 U.S.C. 1604.

Nothing in Section 1603(b)'s text suggests that it addresses the sorts of entities whose conduct may be *attributed* to a foreign state defendant for purposes of determining whether the foreign state has "carried on" commercial activity in the United States. Nor does Section 1603(b) indicate that "Congress intended to displace common-law agency principles * * * for purposes of assessing commercial activity." Pet. App. 24. Indeed, commercial activities carried on by a juridically separate agency or instrumentality gener-

ally should not be attributed to the foreign state absent an agency or alter ego showing. See *First National City Bank* v. *Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 628-633 (1983). Petitioner is also incorrect in suggesting (Pet. 18-19) that the court of appeals' holding that petitioner "carried on" commercial activity by virtue of RPE's acts wrongly treats RPE as part of the "foreign state," even though it does not satisfy the definition of "agency or instrumentality." The conclusion that an entity's acts may be attributed to a foreign state by virtue of agency principles is distinct from, and does not imply, the conclusion that the entity is an organ of the foreign state.

Petitioner's reading of the FSIA, moreover, would allow foreign states engaging in commercial activity in the United States to shield themselves from any exposure to litigation in U.S. courts by the expedient of acting through U.S. entities, which, by definition, are not "agenc[ies] or instrumentalit[ies]" of a foreign state. See 28 U.S.C. 1603(b); Pet. App. 23-27. That result would be inconsistent with the FSIA's purpose of ensuring that U.S. persons have recourse against a foreign state that engages in commercial activity in the United States.

b. Petitioner also argues (Pet. 14-15, 25-28) that the alter-ego test this Court set forth in *Bancec*, *supra*, provides the exclusive means of attributing an entity's actions to a foreign state. In *Bancec*, this Court held that, although instrumentalities of a foreign state are presumed to have independent juridical status, a court may hold an instrumentality liable for the actions of the state itself when the instrumentality is "so extensively controlled by its owner that a rela-

tionship of principal and agent is created," or when recognizing the separate status of the entity would "work a fraud or injustice." 462 U.S. at 629; see *id.* at 628-633.

Bancec thus identifies one way in which an entity's actions may be attributed to a foreign state. One consequence of holding that a state instrumentality is an alter ego of the state under *Bancec* is that the instrumentality is treated as the state's agent for *all* purposes. See *Transamerica Leasing, Inc.* v. *La Republica de Venezuela*, 200 F.3d 843, 848-849 (D.C. Cir. 2000). But *Bancec* does not purport to define the exclusive circumstances in which the actions of an entity should be attributed to a foreign state, or to displace common-law agency principles when a foreign state directs the conduct of an independent entity (as opposed to an agency or instrumentality) for a particular purpose. See *Dale* v. *Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006) (*Bancec* inquiry is "analytically distinct" from the question whether the state has employed an independent agent).

B. Petitioner's contention that the court of appeals' decision conflicts with those of other courts of appeals is without merit. Petitioner relies (Pet. 26) on two decisions that applied the *Bancec* standard to determine whether an instrumentality's acts should be imputed to the foreign state for purposes of the commercial activity exception. See *Transamerica*, 200 F.3d at 847-849; *Arriba Ltd.* v. *Petroleos Mexicanos*, 962 F.2d 528, 533-537 (5th Cir.), cert. denied, 506 U.S. 956 (1992). Neither decision, however, suggested that the *Bancec* standard provides the exclusive means of attributing an entity's actions to the state. To the contrary, both courts also recognized that, even if the

instrumentality's separate juridical status should not be disregarded under *Bancec*, agency principles provided an alternative means of attributing the instrumentality's actions to the state. *Transamerica*, 200 F.3d at 849-850; *Arriba*, 962 F.2d at 534-535.

C. For the reasons stated above, further review of the court of appeals' conclusion that common-law agency principles govern whether RPE's sale of the Eurail pass could be attributed to petitioner is unwarranted.

It is unclear, however, whether the court was correct in concluding that RPE did in fact act as petitioner's agent. Pet. App. 18-19; cf. *Harby* v. *Saadeh*, 816 F.2d 436, 438-439 (9th Cir. 1987) (airline lacked necessary control over travel agent). The court did not discuss RPE's relationship with petitioner in any detail, and it did not state whether it applied state or federal law in determining the existence of an agency relationship. Nor did the court consider whether, even if state law applies, federal law provides limiting principles on the relationships that would support attribution to the foreign state. Cf. *Bancec*, 462 U.S. at 623 (characterizing alter-ego analysis as grounded in "international law and federal common law"). Petitioner has not challenged those aspects of the court's decision before this Court. See Pet. i, 14-15. In any event, the fact-specific question whether RPE acted as petitioner's agent would not merit this Court's review.

II. THE COURT OF APPEALS' HOLDING THAT RESPONDENT'S CLAIMS ARE "BASED UPON" PETITIONER'S COMMERCIAL ACTIVITY IN THE UNITED STATES DOES NOT WARRANT REVIEW

Petitioner also challenges (Pet. 29-35) the court of appeals' conclusion that respondent's claims are "based upon" petitioner's commercial activity in the United States. Although the court applied an overly permissive formulation of the "based upon" requirement, this case would not be a suitable vehicle to provide guidance on the correct application of that requirement.

A. 1. In order to establish jurisdiction over a foreign state under the relevant clause of Section 1605(a)(2), a plaintiff must show that "the action is based upon" the state's commercial activity in the United States. In *Nelson*, this Court held that the phrase "based upon" connotes "conduct that forms the 'basis,' or 'foundation,' for a claim." 507 U.S. at 357. The Court explained that the phrase "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case," and it cited with approval a decision describing the inquiry as focusing on "the gravamen of the complaint." *Ibid.* (quoting *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985)). The Court also cautioned that it "d[id] not mean to suggest that the first clause of [Section] 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state." *Id.* at 358 n.4. The Court concluded that Nelson's claims challenging his torture and imprisonment during his employment in Saudi Arabia were not based upon his recruitment and hiring in the United States. Those commercial

activities, the Court stated, "preceded the[] commission" of the intentional torts Nelson alleged. *Id.* at 358.

2. In this case, the court of appeals stated that a claim is "based upon" commercial activity under *Nelson* if "*an element* of [the plaintiff's] claim consists in conduct that occurred in commercial activity carried on in the United States," or if such activity is an "essential fact" to proving an element of the claim. Pet. App. 33 (citations omitted); *id.* at 35. That understanding of the "based upon" requirement is problematic. As this Court indicated in *Nelson*, the commercial activity must be the "gravamen"—the essence or gist—of the plaintiff's claim, not simply a link in the chain of events that led to an overseas injury. 507 U.S. at 357; accord U.S. Amicus Br. at 10, *Nelson*, *supra* (No. 91-522). Congress's inclusion of the "based upon" language provides a significant limitation on the jurisdiction of courts in cases brought under Section 1605(a)(2) by requiring an appropriate connection between the claims at issue and the foreign state's commercial activities in the United States. There may be situations in which the commercial activity establishes a single element of, or fact necessary to, a claim, and that element is so central to the claim that the commercial activity may be said to be the gravamen of the claim. But a court might apply the single-element formulation in a manner that permits the "based upon" requirement to be satisfied simply because the commercial activity is relevant to an element or factual predicate of the plaintiff's claim that has little to do with the core wrong the plaintiff has allegedly suffered. That could lead the court to assert jurisdiction in a case that does not have a substantial connection to

the foreign state's commercial activity in the United States.

The court of appeals' application of the single-element standard in this case also appears to have been unduly permissive. The court focused on whether the ticket sale in the United States established a fact necessary to an element of each of respondent's claims. Pet. App. 33-40. The court concluded that respondent's claims were "based upon" the sale of the Eurail pass because, under California law, that sale was necessary to (1) establish a heightened duty of care for petitioner as a common carrier for purposes of respondent's negligence claim, and (2) to establish the existence of a transaction between seller and consumer for purposes of respondent's strict-liability and breach-of-implied-warranty claims. *Id.* at 34-40. It is doubtful that the sale of a rail pass in the United States should be considered the gravamen of respondent's claims, as those claims focus on the events in Austria that caused respondent's injury there.

It is difficult to reach a definitive conclusion on this issue, however, because the parties and the court did not analyze the elements of respondent's claims in any detail. As an initial matter, it is not clear that the court was correct in concluding that California, not Austrian, law governs respondent's claims.[2] Neither party appears to have addressed which jurisdiction's law should apply. Pet. C.A. Br. 40-43; Resp. C.A. Re-

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[2] Contrary to the court's assertion, Pet App. 34 n.14, the FSIA's provision that a non-immune foreign state "shall be liable in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 1606, does not indicate that the forum state's law should apply regardless of choice-of-law principles.

ply Br. 6-10. The court's cursory choice-of-law analysis, while assertedly based on the Restatement (Second) of Conflict of Laws (1971) (Restatement), did not weigh all relevant factors or explain why California's interest outweighed Austria's, even though respondent was injured in Austria and her claims concern the duties of common carriers in Austria and the adequacy of Austrian transportation facilities and safety measures. See Pet. App. 34 n.14; cf. Restatement §§ 6, 145; *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 70 (D.C. Cir. 2011) (under Restatement, forum where injury occurred presumptively has stronger interest in personal-injury claims), vacated on other grounds, 527 Fed. Appx. 7 (D.C. Cir. 2013).

Even assuming that the court of appeals correctly concluded that California law applies, the court's analysis of the role that the sale of the rail pass plays in each of respondent's claims under California law was incomplete. The court's analysis was conducted without assistance from the parties, who did not discuss the state-law elements of respondent's claims or address how the Eurail pass sale related to those claims, except at the highest level of generality. See Pet. C.A. Br. 40-43 (arguing that none of respondent's claims were based on pass sale because claims concerned subsequent alleged torts); Resp. C.A. Reply Br. 6-9 (stating that pass purchase was necessary to negligence claim, without discussing other claims). Thus, although the court opined that the purchase of the Eurail pass was an "essential fact" for respondent's negligence claim because the purchase "established a common-carrier/passenger relationship" and therefore a heightened duty of care, Pet. App. 34-35, it is not clear that the purchase of a ticket alone is suffi-

cient to establish such a duty under California law, see *Orr* v. *Pacific Sw. Airlines*, 257 Cal. Rptr. 18, 21-22 (Cal. Ct. App. 1989). The court next concluded that the sale of the pass was a "necessary prerequisite" to respondent's implied-warranty claim. Pet. App. 39. The court did not address, however, whether California law treats a ticket for foreign rail transportation as containing an implied warranty of safety or fitness of railcars and platforms, and if so, whether there would be a sufficient nexus between that claim and the sale of the pass. *Ibid.* The court also assumed that a "sale of a product" is a necessary element of respondent's strict liability claims, *id.* at 38, but as the dissent pointed out, California law may permit respondent to prevail on her claim without showing that any sale took place, *id.* at 60 (citing case involving injuries to user of heavy equipment). Finally, the court did not consider whether, even if the pass sale is an "essential fact" or element of each of respondent's claims under California law, permitting jurisdiction over the claims would run afoul of *Nelson*'s holding that plaintiffs should not be permitted to "recast" claims in a manner that expands the FSIA's commercial activity exception beyond the jurisdictional limits it imposes. 507 U.S. at 363 (rejecting failure-to-warn claim as a "semantic ploy" designed to take advantage of Section 1605(a)(2)).

B. As petitioner observes (Pet. 34), the Second Circuit has used a different formulation than the Ninth Circuit to describe the "based upon" requirement. The Second Circuit has emphasized that a claim "based upon" commercial activity requires a "significant nexus" between the activity and the gravamen of the complaint that exceeds but-for causation.

Kensington Int'l Ltd. v. *Itoua*, 505 F.3d 147, 155 (2007) (emphasis omitted) (holding that plaintiff's claim was not based upon shipments in United States because they were not the core of the alleged conspiracy); see *Transatlantic Shiffahrtskontor GmbH* v. *Shanghai Foreign Trade Corp.*, 204 F.3d 384, 390 (2d Cir. 2000), cert. denied, 532 U.S. 904 (2001). Other courts, however, have used a single-element formulation similar to that employed by the Ninth Circuit. See *Kirkham* v. *Société Air France*, 429 F.3d 288, 292-293 (D.C. Cir. 2005) (under single-element formulation, claims for injuries suffered in French airport were "based upon" ticket sale in United States); *BP Chems. Ltd.* v. *Jiangsu Sopo Corp.*, 285 F.3d 677, 682 (8th Cir.) ("only one element of a plaintiff's claim must concern commercial activity"), cert. denied, 537 U.S. 942 (2002).

The extent to which those different formulations reflect substantive disagreements as to the content of the "based upon" requirement is unclear, however, because each case concerns distinct claims and varying degrees of connection between the commercial activity and one or more elements of the plaintiff's claims. In the one post-*Nelson* decision involving facts materially similar to those presented here, the D.C. Circuit, like the Ninth Circuit here, concluded that the plaintiff's tort claims were "based upon" the defendant's sale of a ticket in the United States.[3] See *Kirkham*, 429 F.3d at 292-293.[4]

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[3] Petitioner relies on *Daimler AG*, in arguing (Reply Br. 1-2) that if it were privately owned, it would not be subject to jurisdiction in U.S. courts for an injury occurring in Austria. *Daimler* held that a private foreign company alleged to have committed torts abroad was not subject to *general* personal jurisdiction based

C. For several reasons, this case does not present an appropriate vehicle to resolve any conflict among the courts of appeals.

First, whatever formulation is used to elaborate on the "based upon" requirement, determining whether a plaintiff's claims are "based upon" commercial activity requires an understanding of both the elements of the claims and of how the commercial activity relates to those elements. See *Kensington*, 505 F.3d at 156-157; *BP Chems.*, 285 F.3d at 683-684. Here, however, it is unclear that the court was correct to apply California law in the first place, but petitioner has not challenged that antecedent conclusion. See Pet. i. Moreover, respondent has not explained the precise state-law theories on which her claims rest or how the sale of the rail pass relates to the elements of each claim, and petitioner has addressed those issues only at a high level of generality. As a result, the court of appeals' analysis of respondent's claims may reflect a mistaken understanding of the governing law, and of respondent's theories under California law, even if that law applies. See pp. 16-18, *supra*.

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solely on the sales activities of a U.S. subsidiary. 134 S. Ct. at 759-760. Because the FSIA's commercial activity exception requires that the plaintiff's claim be "based upon" the foreign state's commercial contacts with the United States, however, the more relevant private-entity analog is specific jurisdiction, which requires that the plaintiff's suit "aris[e] out of or relat[e] to the defendant's contact[] with the forum." *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 n.8 (1984).

[4] Two other courts reached the same conclusion before *Nelson*. See *Santos* v. *Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991); *Barkanic* v. *General Admin. of Civil Aviation of China*, 822 F.2d 11, 13 (2d Cir.), cert. denied, 484 U.S. 964 (1987).

This case would therefore be a poor vehicle in which to address the meaning of the "based upon" standard. Given the case-specific nature of the inquiry and the difficulty of clarifying the standard with any one verbal formulation, the ideal vehicle would be one in which the Court could give concrete guidance to lower courts by applying the standard to the claims at issue. The lack of development below and consequent uncertainty about respondent's theories of her claims would make any such application difficult in this case.

Second, the district court may dismiss this case based on alternative grounds it has not yet considered, including forum non conveniens and international comity. See Pet. App. 7. Although the court of appeals' conclusion that California has a "strong interest" in the suit for purposes of its choice-of-law analysis, *id.* at 35 n.14, may be relevant to the forum non conveniens and comity inquiries, the district court should have the opportunity to consider those questions in the first instance. It appears that at least some of the factors relevant to forum non conveniens, such as the location of the evidence and witnesses, would weigh in favor of dismissal. See generally *Carijano* v. *Occidental Petroleum Corp.*, 643 F.3d 1216, 1229-1234 (9th Cir. 2011), cert. denied, 133 S. Ct. 1996 (2013).

Finally, cases raising the "based upon" question in the context presented here—*i.e.*, where a plaintiff brings suit in the United States after purchasing a foreign travel ticket in the United States—arise only infrequently, and they will likely become rarer in the future. As this Court has observed, forum-selection clauses are often included in form ticket contracts for travel in order to limit the forums in which the carrier

can be sued, and such clauses are enforceable when reasonable. See *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 593-594 (1991); *UNC Lear Servs., Inc.* v. *Kingdom of Saudi Arabia*, 581 F.3d 210, 219 (5th Cir. 2009), cert. denied, 559 U.S. 971 (2010). Although it is unclear whether the pass at issue in this case contains a forum-selection clause, carriers may be able to use such clauses to ensure that passenger claims are brought in the carriers' chosen forum.

Indeed, multi-country Eurail passes like the one at issue here now expressly provide that they are governed by the Convention concerning International Carriage by Rail and the Uniform Rules concerning the Contract of International Carriage of Passengers by Rail. See *Eurail Pass Conditions of Use*, http://www.eurailgroup.org/Rail%20Passes/~/media/CoU_2014/Eurail%20Pass%20%20%20COU%202014.ashx (last visited Dec. 4, 2014); Int'l Rail Transp. Comm. Amicus Br. 6-11. Under the Uniform Rules, a plaintiff must file suit in the forum of the defendant carrier's residence. *Convention concerning International Carriage by Rail: Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV)*, Tit. VI, art. 57, at 34 (July 1, 2006), http://www.cit-rail.org/en/rail-transport.law/cotif/. The Uniform Rules provide that carriers "shall be liable" for losses or damages resulting from personal injuries arising from rail travel. *Id.* Tit. IV, ch. I, art. 26, at 19; see *id.* art. 28, at 20.

Because the availability of forum-selection clauses makes it unlikely that suits similar to this one will arise with any frequency, this case is an unsuitable vehicle to provide additional guidance on how the "based upon" inquiry should proceed. In addition, the

ability of state-owned passenger carriers to use forum-selection clauses to ensure that suits are brought in their home forums mitigates to a considerable degree petitioner's concern that the decision below "would permit a foreign state-owned carrier to be dragged into U.S. court" against its will based on "attenuated or non-existent" contacts with the United States. Reply Br. 1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
APR 7 - 2014

No. 13-1067

IN THE

Supreme Court of the United States

OBB PERSONENVERKEHR AG,
Petitioner,

v.

CAROL P. SACHS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER IN ITS PETITION FOR A WRIT OF CERTIORARI

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INTERESTS OF THE *AMICUS CURIAE*

The Government of the Kingdom of the Netherlands ("the Government") is committed to the rule of law and to the basic principles of international law that impose restraints on the assertion of jurisdiction by one State over civil actions against foreign State-owned entities.[1]

The Government is extremely concerned about the broad exception to the basic principle of sovereign immunity that the Ninth Circuit Court of Appeals created when it held that:

> [a] foreign-state owned common carrier, such as a railway or an airline, engages in commercial activity in the United States when it sells tickets in the United States through a travel agent regardless of whether the travel agent is a direct agent or subagent of the common carrier.

Pet. App. at 4. On this basis, the Ninth Circuit held that the American purchaser of such a ticket could bring suit in the United States against the foreign state-owned carrier for any accident in the foreign country.

The Government sees this decision as a particularly egregious example of jurisdictional overreaching and therefore is concerned about allowing the decision to stay in place for even a short period of time.

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amicus Curiae*, its members, and its counsel contributed monetarily to the preparation or submission of this brief. Counsel of Record for both Petitioner and Respondent received timely notice of *Amicus Curiae*'s intent to file this brief, and both Petitioner and Respondent have granted their consent to the filing of this brief.

The Government has consistently opposed broad assertions of extraterritorial jurisdiction over alien persons arising out of foreign disputes with little, or no, connection to the United States. Such assertions of jurisdiction are contrary to international law and create a substantial risk of jurisdictional and diplomatic conflict. They may also prevent another State with a greater nexus to such cases from effectively resolving a dispute.

The Government remains deeply concerned about the continued failure by some U.S. courts to take account of the jurisdictional constraints under international law when construing domestic statutes, notwithstanding the Supreme Court's concerns with the exercise of expansive extraterritorial jurisdiction in such cases as *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004) ("*Empagran*") and *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) ("*Kiobel*"), cases in which the Government jointly participated as an *amicus curiae*.[2]

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[2] Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland, and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners, *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004) (No. 03-724), 2004 U.S. S. Ct. Briefs LEXIS 104; Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of the Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 U.S. S. Ct. Briefs LEXIS 519; and Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 U.S. S. Ct. Briefs LEXIS 2651.

This brief is intended to set out the views of a nation that has been historically concerned with the extra-territorial exercise of jurisdiction by the United States. It is purely intended to urge this Court to apply to the Foreign Sovereign Immunities Act ("FSIA") the same types of jurisdictional restraints recognized in international law that the Government has previously urged and this Court has accepted in such cases as *Empagran* and *Kiobel*.

SUMMARY OF THE ARGUMENT

The Government urges the Court to grant Certiorari on the following Question:

> Whether it would be consistent with international law for a U.S. court to construe the "commercial activity carried on in the United States" exception in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(2), to allow suit in the U.S. courts against a foreign state-owned railway for an injury that was suffered abroad, based solely on the purchase of a ticket from a U.S.-based internet seller that was not owned or controlled by the foreign state-owned entity.

This is a relatively simple case factually, which makes it an excellent vehicle for the Court to resolve the likely confusion generated by the Ninth Circuit's overly expansive approach to the "commercial activity carried on in the United States" exception contained in the FSIA, 28 U.S.C. § 1605(a)(2).

The plaintiff, Mrs. Carol Sachs, purchased on the internet a four-day Eurail pass from a Massachusetts-based business called Rail Pass Experts ("RPE"), and while using it to board a train operated by the Austrian state railway OBB Personenverkehr AG ("OBB"), she suffered a serious injury.

OBB had no corporate affiliation or agency agreement with RPE. Nevertheless, the en banc court in the Ninth Circuit held that: (i) OBB was engaged in "commercial activity carried on in the United States" solely as the result of RPE's sale of a Eurail pass to a person in the United States, Pet. App. at 32, and (ii) the plaintiff's injuries suffered in Austria were "based upon [this] commercial activity carried on in the United States" Pet. App. at 40. Both determinations stretch credibility to the limit.

In deciding the case, the Ninth Circuit completely ignored its own prior analysis. In *McKeel v. Islamic Republic of Iran*, the Court stated:

> [N]othing in the legislative history [of the FSIA] suggests that Congress intended to assert jurisdiction over foreign states for events occurring wholly within their own territory. Such an intent would not be consistent with the prevailing practice in international law. That practice is that a state loses its sovereign immunity for tortious acts only where they occur in the territory of the forum state.

722 F.2d 582, 588 (9th Cir. 1983) (interpreting the FSIA in conformity with the European Convention on State Immunity and declining to allow plaintiffs to seek damages against Iran for acts which occurred at the U.S. Embassy in Tehran). The Ninth Circuit's 1983 analysis is correct and should have been applied here.

Accordingly, the Government respectfully urges this Court to grant Petitioner's Writ of Certiorari and reverse the Ninth Circuit decision.

ARGUMENT

I. THE FSIA REPRESENTS A CONGRESSIONAL EFFORT TO MINIMIZE JURISDICTIONAL UNCERTAINTY IN WAYS CONSISTENT WITH THE PRACTICES OF OTHER NATIONS

That serious inter-governmental difficulties may well be generated by disputes over sovereign immunity was well recognized by this Court in an important case concerning assets seized by Cuba in 1960 after the Castro-led revolution. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) ("*Dunhill*"). This case was decided a few months before the FSIA was enacted. The Court underscored the practical problems in this area, with respect to immunity from suit over seized property: "[t]he judicial seizure of the property of a friendly state may be regarded as [] an affront to its dignity " *Id.* at 700 (citation omitted).

The Court explained that the historic policy of total blanket immunity for the actions of foreign sovereigns had been abandoned by the United States in 1952 in favor of the so-called "restrictive" policy on sovereign immunity because:

> this approach has been accepted by a large and increasing number of foreign states in the international community . . . and . . . subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts.

Dunhill, 425 U.S. at 702-704. The *Dunhill* case exposed the practical difficulties of applying sovereign

immunity and appears to be a reason that Congress enacted the FSIA the same year in order to codify and clarify what the Court had described.

The goal of bringing greater certainty and fairness to the "restrictive" sovereign immunity doctrine led to the enactment of the "based on a commercial activity carried on in the United States" proviso in Section 1605(a) that is at issue in the current case. 28 U.S.C. § 1605(a)(2). There is no indication in the statutory language or legislative history that Congress wished this proviso to create a sprawling exception to the general rule that foreign sovereigns are exempt from liability in the U.S. state and federal courts. Section 1603(e) of the Act simply provided a definition that "[a] 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and *having substantial contact with the United States*." 28 U.S.C. § 1603(e) (emphasis added).

The political and diplomatic sensitivities discussed in *Dunhill* thus help explain why this Court has repeatedly emphasized that the FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) ("*Nelson*") (citation omitted).

II. THE NINTH CIRCUIT'S DECISION CREATES GREAT RISKS AND UNCERTAINTIES FOR FOREIGN STATE OWNED COMMON CARRIERS

The en banc court flatly held that ". . . the FSIA commercial-activity exception applies to a common carrier owned by a foreign state that acts through a domestic agent to sell tickets to United States citizens or residents for passage on the foreign common carrier's transportation system." Pet. App. at 41. This

is because, "[t]he sale and marketing of Eurail passes within the United States is sufficient to meet the substantial-contact element and to show that OBB carried on commercial activity in the United States." Pet. App. at 32.

Thus, an U.S.-based internet seller of foreign transportation tickets (RPE) is treated as an integral part of "the foreign state" sufficient to trigger U.S. jurisdiction under the FSIA—even when, as here, there is no showing that the alleged agent is owned or controlled by the Austrian Government or its state-owned railway, or even has any direct contractual relationship with the Austrian parties. The Ninth Circuit used "traditional agency principles" and "[c]ommon sense", Pet. App. at 15 and 23, to reach a decision that utterly fails to appreciate the basic message of the FSIA—namely, a foreign sovereign is not "a traditional principal" in a commercial relationship. This is reflected in the statutory definition of "[a]n agency or instrumentality of a foreign state" in Section 1603(b). 28 U.S.C. § 1603(b). It explicitly excludes an entity which is "a citizen of a State of the United States"—which RPE is. Pet. App. at 5.

By thus ignoring the basic goals and provisions of the FSIA, the Ninth Circuit creates universal civil jurisdiction for U.S. courts against foreign governmental entities that goes well beyond what this Court would permit a U.S. tort victim to bring for a foreign injury against a foreign corporation under international law or the "due process" guarantees of the Fifth and Fourteenth Amendments of the U.S. Constitution.

The Ninth Circuit's erroneous decision could conceivably extend to situations where a foreign state-owned common carrier sells tickets directly from its

website to customers all over the world, but otherwise has no contacts with the United States. Surely, the mere purchase of a ticket from a website accessible in the United States cannot automatically give the U.S. courts global jurisdiction over any injury sustained abroad by a U.S. national while travelling on the ticket.

This is part of a familiar picture. Mrs. Sachs would prefer to sue OBB in a U.S. court. The unique attractiveness of the United States as a forum for international plaintiffs and plaintiffs' lawyers is well known to this Court, and can be traced to a series of decisions by the U.S. to accord private plaintiffs a set of advantages that most other countries have not accepted. Those advantages are very familiar. *Firstly*, the so-called "American rule" on litigation costs requires each side to bear its own costs—rather than requiring the losing plaintiff to reimburse some or all of the successful defendant's costs; and the defendants' litigations costs are generally driven up by the broader discovery available to U.S. plaintiffs. *Secondly*, the constitutionally guaranteed right to a jury trial in civil damages cases is generally not available elsewhere. *Thirdly*, punitive damages are available in the United States, but generally are not allowed elsewhere.

This combination of advantages helps to explain why this Court continues to see plaintiffs' counsel make so many U.S. claims for faraway wrongs—including class action claims—based on expansive assertions of U.S. jurisdiction that this Court has found to be inconsistent with international law and comity. *See* Argument Part V below.

Because this Ninth Circuit decision directly concerns not only Austria, but many other sovereigns operating state-owned transportation systems which

serve American tourists, the Government respectfully urges this Court to restore the "commercial activities" proviso in the FSIA to its rightful, but geographically-limited place. Even if the *OBB* decision were rightly ignored in other circuits, it would still bind courts in states with approximately 19% of the American population; and it would also attract forum shopping expeditions from other circuits.

III. THE NINTH CIRCUIT DECISION, BEING SO CLEARLY INCONSISTENT WITH INTERNATIONAL LAW, IS ESPECIALLY LIKELY TO GENERATE JURISDICTIONAL CONFLICTS WITH FOREIGN SOVEREIGNS

Allowing Mrs. Sachs to bring suit in the United States just because she brought her foreign ticket from a U.S. travel agent fundamentally infringes the rights of the foreign state (in this case Austria) to provide judicial remedies against itself in its own courts under its own laws, just as the U.S. does with its U.S. Court of Claims.

It is a bedrock principle of international law that each sovereign Nation is equal and entitled to prescribe laws and to adjudicate claims regarding those persons within its sovereign territory. *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825) ("No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another.").

Similarly, principles of international law inform the interpretation of U.S. statutes. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that "an act of Congress ought never to

be construed to violate the law of nations if any other possible construction remains . . .").

Questions concerning sovereign immunity are particularly sensitive under international law. This is why a 2012 decision of the International Court of Justice has held that determinations of sovereign immunity should be made at the outset of the claim whenever possible, and not later in the case after extensive discovery.[3] The Court expressed concern that, in such cases, a claimant might somehow defeat sovereign immunity "simply by skilful construction of the claim."[4]

A. The Restatement of Foreign Relations Would Not Allow Extraterritorial Jurisdiction Over this Case

The conduct at issue here does not fall within any of the categories of extraterritorial jurisdiction recognized in the Third Restatement of Foreign Relations. Restat. (Third) of the Foreign Relations Law of the U.S. § 402 (1987).

First, the alleged acts of negligence by OBB have not had a "substantial effect" within the territory of the U.S. *Id.* § 402(1)(c). *See also Hartford Fire Insurance Co. v. Cal.*, 509 U.S. 764, 796 (1993) (upholding U.S. jurisdiction over "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States").

Second, the "passive personality" principle, where jurisdiction is based on the nationality of the plaintiff

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[3] *See Jurisdictional Immunities of The State* (Germany v. Italy: Greece Intervening), 2012 I.C.J. 143, ¶ 82 (Feb. 3) *available at* http://www.icj-cij.org/docket/files/143/16883.pdf.

[4] *Id.*

only, "has not been generally accepted for ordinary torts. . . ." Restat. (Third) of the Foreign Relations Law of the U.S., § 402, cmt. g.

Third, the national security interests of the United States are not implicated by this case, and thus would not provide a basis for extraterritorial jurisdiction. *See id.*, § 402 (3).

Furthermore, this case would not satisfy the totality of factors that courts should consider when deciding whether the exercise of jurisdiction over "a person or activity having connections with another state" is reasonable or not. *Id.*, § 403.

To take the Ninth Circuit's defective logic in *OBB* to its full extreme, suppose that the famous Mrs. Palsgraf was an Austrian resident who had purchased her Long Island Railroad ticket in Austria. Fearing that she might lose in the New York courts, she brought suit in Austria and prevailed under some theory of absolute liability that was inconsistent with the negligence standard employed by Judge Cardozo in his landmark decision for the New York Court of Appeals. *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339 (N.Y. 1928). Would U.S. courts recognize such a judgment based on such a tenuous jurisdictional link to Austria?

B. The Ninth Circuit's Decision is Plainly Inconsistent with the European Convention on State Immunity

This Court has previously looked to the European Convention on State Immunity when interpreting the scope of the FSIA, as have several Court of Appeals decisions. *See, e.g., Republic of Aus. v. Altmann*, 541 U.S. 677, 708 (2004) (concurring opinion of Justices Breyer and Souter using the European Convention to

help interpret the FSIA).[5] This is an accepted practice because "Congress intended that the FSIA would make United States law on sovereign immunity consistent with international law", *McKeel v. Islamic Republic of Iran*, 722 F.2d at 587, and the European Convention was signed some four years before the FSIA was enacted. European Convention on State Immunity, May 16, 1972, 1495 U.N.T.S. 182 (entered into force June 11, 1976).[6] Both the Government and Austria are parties to this Convention.[7]

Under that Convention, OBB would be entitled to sovereign immunity for the facts alleged in this case. Article 15 provides that states should be accorded immunity unless one of the enumerated exceptions applies. *Id.*, art. 15.

The only two potentially relevant exceptions concern the place of injury and the defendant state's presence in the forum state. Thus Article 11 of the Convention provides:

> A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury

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[5] *See also Bank of N.Y. v. Yugoimport*, No. 11-CV-1990, 2014 U.S. App. LEXIS 2454, at *27 (2d Cir. Feb. 10, 2014) (analyzing the European Convention on State Immunity to interpret the FSIA).

[6] *Available at* http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm.

[7] European Convention on State Immunity, CETS No. 074, Treaty open for signature by the member States and for accession by non-member States, *available at* http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=074&CM=&DF=&CL=ENG

> or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

Id., art. 11. And Article 7(1) provides:

> A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment.

Id., art. 7(1). This provision echoes in somewhat clearer language what is provided in Section 1605(a)(2). 28 U.S.C. § 1605(a)(2).

Thus a court in a state party to the European Convention could not assert the type of jurisdiction asserted by the faraway Ninth Circuit in this case. It would be appropriate for this Court to consider this reality in making a decision to hear and reverse the Ninth Circuit decision.[8]

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[8] Furthermore, the U.N. Convention on Jurisdictional Immunities of States and their Property, which has not yet entered into force, would also provide sovereign immunity under the facts of this case. U.N. Convention on Jurisdictional Immunities of States and Their Property, U.N. Doc. A/59/508 (Dec. 2, 2004), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/59/38&Lang=E. This Convention allows states to claim immunity against claims of personal injury unless the "act or omission occurred in whole or in part in the territory of [the forum] State and if the author of the act or omission was present in that territory at the time of the act or omission" *Id.*, art. 12.

IV. THE NINTH CIRCUIT'S DECISION IS A TROUBLESOME DEPARTURE FROM THIS COURT'S EARLIER FSIA DECISIONS

This Court has continued to recognize that the "based upon commercial activity carried on in the United States" proviso, 28 U.S.C. § 1605(a)(2), is a careful exception to the broad, historic rule that the activities of foreign sovereigns are generally exempt from judicial liability. Issues of "grace and comity" run through the whole sovereign immunity doctrine. *See The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983).

The Court has looked very carefully at three related questions in past cases involving this proviso: (i) was the foreign government actually engaged in relevant "commercial activity"? (ii) if so, was this activity "carried on in the United States"? and (iii) was any foreign injury actually "based upon" some U.S. commercial activity by the defendant? If the answer to any of these questions is "no", then this Court has found that there is no FSIA jurisdiction in the United States. The Ninth Circuit's decision gave inappropriate "yes" answers to the second and third of these questions and thus produced a decision that is in fact entirely inconsistent with this Court's prior efforts.

A. Who Conducted the "Commercial Activity" that Actually Took Place in the United States?

In the *OBB* case, there is no doubt that OBB is engaged in the "commercial activity" of running trains in Austria. But is it also itself engaged in selling rail tickets in the United States? To answer this "yes", the Ninth Circuit had to treat the unaffiliated U.S.-based

ticket agent RPE as if it were an instrumentality of the Austrian state. Doing so runs clearly counter to this Court's careful discussion of the government-entity affiliation issue in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*").

The question in *Bancec* was whether a Cuban state-owned bank could be held responsible for a party's broader claims against the government for expropriation of its assets. In dealing with the affiliation issue, the Court observed that, "[d]uring its deliberations, Congress clearly expressed its intention that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." *Bancec*, 462 U.S. at 626-627 (citations omitted).[9] If a government-created entity is presumed to be separate from another part of the state, then surely it must be appropriate to treat that separate government entity as separate from some distant travel agent—rather than treating it is an instrumentality of the foreign state for FSIA purposes, as the Ninth Circuit has done.

The relationship between OBB and RPE does not come within sight of an "alter ego" relationship or even a strict "agency" standard. The OBB situation can be contrasted with the agency relationship at issue in another of the Court's careful FSIA decisions, *Nelson*. 507 U.S. 349 (1993). There the most relevant "commercial activity" was the recruitment, training

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[9] In *Bancec*, the Court was dealing with a situation where the District Court had found that, "Bancec is an alter ego of the Cuban Government", 462 U.S. at 618, and in these circumstances to allow it to escape liability, this Court said, "would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises." *Id.* at 633.

and contract negotiated by the Hospital Corporation of America, as an agent for the defendant, a foreign government-owned hospital in Saudi Arabia. It was this contract that took the plaintiffs to Saudi Arabia, but this was not enough to establish liability for the injuries that they suffered later.

B. Was the Plaintiff's Injury "Based Upon" Whatever "Commercial Activity" was Found to Have Been Conducted in the United States?

The Court's *Nelson* decision is directly relevant on this crucial point. The plaintiffs were bringing tort claims about how they were mistreated and tortured by agents of the Saudi Government because one of them engaged in whistleblowing on safety violations by his government-hospital employer. The majority rejected the claim that these injuries were "based on" this commercial activity. Rather the majority defined "based upon" to cover "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. at 357.

The *Nelson* plaintiffs' claims that jurisdiction could be "based upon" their original hiring was rejected because "those facts alone entitle the [plaintiffs] to nothing under their theory of the case"—which was necessarily based on torts rather than breaches of contract. *Id.* at 358. Moreover, "a foreign state's exercise of the power of its police has long been understood as peculiarly sovereign in nature." *Id.* at 361. In their concurrence, Justices White and Blackmun thought that deliberate retaliation for whistleblowing could be treated as a "commercial activity", but they concurred in the judgment because it was not "carried on in the United States." *Id.* at 364.

The same thing is essentially true in the present case. The plaintiff's claims are based on torts occurring in Austria, not breaches of a contract made in the United States. Indeed, the present case is even more extreme, since the plaintiff's claim is based on negligence, rather than deliberate acts by the defendant.

V. THE COURT SHOULD TAKE THIS OPPORTUNITY TO APPLY ITS OWN "DUE PROCESS" DECISIONS CONCERNING U.S. JURISDICTION OVER FOREIGN CORPORATIONS IN CONSTRUING THE "COMMERCIAL ACTIVITY" PROVISO IN THE FSIA

In *J.McIntyre Mach., Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011), this Court sent a strong general message which the Ninth Circuit apparently did not hear.

> "Due process protects the [foreign] defendant's right not to be coerced except by lawful judicial power. As a general rule, the exercise of judicial power is not lawful unless the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

Id. at 2785 (plurality opinion by Justice Kennedy) (citation omitted).

McIntyre concerned injuries caused in New Jersey by machinery that had been manufactured in the United Kingdom and shipped to an U.S. agent who sold four of them in New Jersey. In rejecting New Jersey's jurisdiction over the U.K.-based manufacturer, the Court said, "[t]he defendant's transmission of goods permits the exercise of jurisdiction only where

the defendant can be said to have targeted the forum; as a general rule it is not enough that the defendant might have predicted that its goods would reach the forum State." *Id.* at 2788. Jurisdiction was denied because the defendant lacked offices or employees or targeted promotional efforts in the forum. In his concurring opinion, Justice Breyer noted the new reality in which "a company targets the world by selling products from its Web site", but agreed that this should not justify the Court in departing from its traditional approach. *Id.* at 2792.

In the same Term, the Court addressed a related due process issue where the domestic plaintiff was making a negligence claim against a foreign corporation for injuries suffered abroad. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011) ("*Goodyear*"). Here the North Carolina plaintiffs sought to assert jurisdiction against the foreign subsidiary of a major U.S. corporation for a death and injuries caused in France based on allegedly defective tires manufactured in Turkey. This time a unanimous Court held (in an opinion by Justice Ginsburg) that sporadic sales of the foreign subsidiary's tires in North Carolina through intermediaries were "far short of the continuous and systematic general business contacts necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State." *Id.* at 2857 (citation omitted).

McIntyre and Goodyear have since been applied by the District Court in Massachusetts to a set of facts almost identical to those at issue in the current *OBB* case. In *Weinberg v. Grand Circle Travel, LLC*, 891 F. Supp. 2d 228 (D. Mass. 2012), the Court rejected the

claim by U.S. residents that they could sue a foreign tour operator in tort for injuries suffered in Africa because they had bought their tour tickets in person from a Massachusetts-based travel agent. Judge Young made two findings that are equally applicable to the current case. First, "[the plaintiffs] have not provided any evidence to show that the [foreign tour operator] Defendants directly targeted Massachusetts residents. It appears that any contacts made were random, isolated, or fortuitous." *Id.* at 246 (citation omitted). Second, the plaintiffs' "advanced reservation agreement with [the domestic travel agent] would hardly be an important, or perhaps even material, element of proof in their negligence case" *Id.* at 245 (citation omitted). The same would be true here.

To summarize, in construing the FSIA, the Ninth Circuit has in effect embraced the "'sprawling view of general jurisdiction' [that this Court] rejected in *Goodyear*." *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014)("*Daimler*")(citation omitted). Under the principles articulated in *McIntyre* and *Goodyear*, and just reaffirmed in *Daimler*, Mrs. Sachs has to make a *general jurisdiction* claim against OBB, because her injuries flow not from the Eurail pass that she purchased in the United States, but from the accident that occurred in Austria; and OBB does not come close to having the kinds of contacts with California that could satisfy the "traditional notions of fair play and substantial justice" mandated by *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) and its progeny.

VI. BASIC PRINCIPLES OF INTERNATIONAL DIPLOMACY AND COMITY ARE EVEN MORE IMPORTANT WHERE A FOREIGN SOVEREIGN IS THE DEFENDANT IN AN EXTRA-TERRITORIAL CASE

During the past decade, almost every member of this Court has written an opinion expressing concern about potential adverse effects when a state court or a federal court of appeals has proposed to exercise expansive U.S. jurisdiction over a foreign corporation for an alleged wrong that occurred abroad and had no significant effect within the United States. The Government respectfully urges that these concerns are doubly relevant in the current case.

This Term Justice Ginsburg, writing for seven other Justices in *Daimler*, made a general point that is equally applicable in the current case:

> The Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case.

Daimler, 134 S. Ct. at 763. Earlier in the opinion, Justice Ginsburg expressed concerns about what she called, "the Ninth Circuit's agency theory" as inappropriately subjecting "foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate ." *Id.* at 760.

In the *OBB* case, the Ninth Circuit has taken its "agency theory" of general jurisdiction a step further when a foreign government has an unaffiliated

U.S.-based entity selling a domestic resident a foreign ticket.

The Chief Justice's opinion in *Kiobel* reflected an analogous concern in explaining why the Court had decided there was no jurisdiction over the claims of a group of U.S. resident aliens for injuries that they had suffered abroad. "The presumption against extraterritoriality guards against our courts triggering such foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches." *Kiobel*, 133 S. Ct. at 1669.

What the Ninth Circuit has done in its *OBB* decision is fundamentally at odds with this Court's emphasis that the "presumption against extraterritoriality" governs, unless Congress has so specified to the contrary. *See, e.g., Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881 (2010). Here in the FSIA, Congress has in fact given an explicit message that the Act's extraterritorial reach is limited to situations where a claim is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States" 28 U.S.C. § 1605(a)(2). But the conduct at issue here cannot be said to have had a "direct effect in the United States." Instead with its attenuated "agency" concept, the Court of Appeals has stood the FSIA on its head and in effect said OBB may be sued in the United States for injuries suffered while it ran commercial activities carried on in Austria.

VII. THE NINTH CIRCUIT'S EXPANSIVE APPROACH EXPOSES FOREIGN STATE-OWNED ENTITIES TO LARGE U.S. CLASS ACTIONS FOR ACTIVITIES ENTIRELY CARRIED ON ABROAD

The U.S. system of class actions has generated serious concerns among foreign enterprises, governments and lawyers because it is seen as involving large and expensive lawsuits, some of which appear to have been opportunistic. What makes the U.S. system such a source of concern is the apparently unique way it combines (i) opt-out class actions (which produce much larger aggregations of plaintiff claims), with (ii) the so-called "American rule" on litigation costs (which relieves the plaintiffs and class counsel of any obligation to pay defendants' costs of successfully defending a claim). Thus, as the European Commission considered the important subject of providing collective redress for consumers and other multiple victims, there is a recurring chorus about the need to avoid the abuses of the U.S. system.[10] This concern has led the Commission to recommend opt-in (or representative) collective actions, while emphasizing that "funding mechanisms available for collective actions should not create incentives for abusive litigation".[11] The 'opt-in' model has been adopted by most Member States, while an opt-out system has been adopted in the

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[10] *See Towards a European Horizontal Framework for Collective Redress*, at 8, COM (2013) 401 final (June 11, 2013), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0401&from=en (stating that "'Class actions' in the US legal system are the best known example of a form of collective redress but also an illustration of the vulnerability of a system to abusive litigation").

[11] *Id.* at 15.

Netherlands for collective settlements and in a few other Member States for collective actions,[12] but always coupled with "loser pays" cost rules that are the norm in non-U.S. jurisdictions.[13]

As this Court well knows, U.S. class actions are based on the same jurisdictional rules as individual cases; and a majority of the recent cases where this Court has had to reverse unwarranted findings of extraterritorial U.S. jurisdiction have been brought by class action lawyers. *See, e.g.*, *Empagran*, 542 U.S. 155, *Morrison*, 130 S. Ct. 2869, *Kiobel*, 133 S.Ct. 1659 and *Daimler*, 134 S. Ct. 746.

Thus, the Government is concerned that the Ninth Circuit *OBB* decision, if left standing, will encourage and facilitate expensive class actions against foreign state-owned common carriers serving U.S. visitors.

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[12] Portugal and Bulgaria and as well as in Denmark for clearly defined consumer cases brought as representative actions.

[13] Bureau Européen des Unions de Consommateurs (The European Consumer Organization), *Litigation funding in relation to the establishment of a European mechanism of collective redress*, Section IV (Feb. 12, 2012) *available at* http://www.beuc.eu/publications/2012-00074-01-e.pdf

CONCLUSION

For the foregoing reasons, the Government respectfully urges this Court to grant Petitioner's Writ of Certiorari and reverse the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

ÖBB PERSONENVERKEHR AG,
Petitioner,
v.
CAROL P. SACHS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE INTERNATIONAL RAIL TRANSPORT COMMITTEE ("CIT") IN SUPPORT OF ÖBB'S PETITION FOR WRIT OF CERTIORARI

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BRIEF OF AMICUS CURIAE

International Rail Transport Committee — known as "CIT" for *Comité International des Transports Ferroviaires* — submits this brief in support of ÖBB Personenverkehr AG's petition for certiorari.[1]

INTEREST OF AMICUS CURIAE

Founded in 1902, CIT is a nonprofit association of over 200 railway undertakings and shipping companies, primarily in Europe, that provide international passenger and freight services. Specifically, CIT consists of about 120 direct members and approximately 80 organizations linked indirectly as associate members. Headquartered in Bern, Switzerland, CIT is an association under Swiss law. (See www.CIT-rail.org.)

CIT represents the interests of rail carriers vis-à-vis legislators, regulatory authorities, and other tribunals. CIT helps railways implement international rail transport law. CIT drafts and maintains legal publications and template

[1] Counsel for CIT authored this brief in whole and no other person or entity other than CIT, its members or counsel made a monetary contribution to the preparation or submission of this brief. CIT's counsel notified counsel for the parties of its intent to file this amicus brief ten days before this filing, and received their consent.

documents for international rail traffic; standardizes contractual relationships between customers, carriers and infrastructure managers; and provides regular briefings, training courses and legal advice to its members.

CIT is funded by its members' annual dues, paid in proportion to the volume of international passenger or freight traffic they transport. The minimum annual subscription is approximately €1700. Each full member has one vote, regardless of the amount of its dues.

ÖBB-Holding AG, the parent entity over subsidiaries ÖBB-Personenverkehr AG (Österreichische Bundesbahnen, i.e., Austrian Federal Railways for passengers) and Rail Cargo Austria AG, is a CIT member, and pays membership fees of about €202,000. ÖBB-Holding made no special payment for this amicus brief.

Approximately 90% of CIT's railway members are, like ÖBB, government entities. Tens of thousands of Americans purchase Eurail Passes annually, and many more American passengers use other CIT member railways. Thus CIT's members may find themselves in the same situation as ÖBB — that is, having their foreign sovereign immunity defeated by the "commercial activities" exception (28 U. S. C. §1605(a)(2)) simply because an American passenger

purchased a ticket through a travel agency in the United States. As a result, European railways could be forced to defend tort actions in the United States arising from accidents occurring entirely in Europe.

The Ninth Circuit's opinion affects not only petitioner ÖBB, but many railways around the world, and especially CIT's membership. The opinion exposes CIT's members to litigation in American courts in new and unexpected ways, contrary to existing understanding of American and international law.

If sovereign immunity is so easily bypassed as in this case, foreign governments and international treaty organizations may respond in kind, diminishing their own immunity rules. Many Europeans use American railways, yet those railways presumably do not expect to be haled into European courts to resolve personal tort claims for accidents in the United States. At the very least, without this Court's intervention and corrective action, European railways will be forced to change their business practices to avoid exposure to American lawsuits. Such changes are likely to make it more inconvenient for Americans to purchase international railway passage.

In short, as the interface between the law and business practices of the European railway industry, CIT has a vital interest in the issues raised by this case. CIT is able to present an

industrywide and broader international law perspective that may be helpful to the Court.

SUMMARY OF ARGUMENT

Once again, the Ninth Circuit Court of Appeals has expanded the reach of American courts beyond existing precedent and the governing law of agency. See, *e.g.*, *Daimler AG* v. *Bauman*, 571 U. S. __, 134 S. Ct. 746 (2014). Once again, this Court's involvement is necessary to correct an erroneous decision beyond the bounds of both American and international law.

An International Perspective: Plaintiff Carol Sachs' voyage falls under international conventions that regulate it in mandatory ways, including setting the rules on the railway's liability and establishing procedural aspects of claims and legal actions. Ms. Sachs should have filed in Austria, and doing so would have well protected her rights. She could have obtained many forms of redress and damages, possibly even remedies beyond what American law provides. The Ninth Circuit's approach is out of step with the governing conventions of international rail law.

Furthermore, with regard to American law, immunity is supposed to protect foreign states unless that state engages in commercial activity in the United States and the lawsuit is

"based upon" that commercial activity. Neither element is satisfied in this case.

Error Regarding Agency: The Ninth Circuit found that ÖBB engaged in commercial activity in the United States based on the acts of an agent's subagent. But the connection between ÖBB and the American travel agency — which actually involved sub-agencies across three continents over which ÖBB had no control — is far too attenuated to support the conclusion of commercial activity in the U.S. by ÖBB. The necessary control by a principal is entirely lacking in this scenario involving ticket vendors through multiple subagents.

The Ninth Circuit used common-law agency principles to broadly interpret this exception to immunity. But applying common law creates possible different outcomes for various American jurisdictions. Instead, the court should have interpreted the exception narrowly and should have done so using federal precedent. As Judge O'Scannlain noted in his dissent: "Courts should guard against overly broad readings because expanding federal jurisdiction in this area can have serious foreign policy consequences." (App. to Pet. for Cert. 43.)

Finally, Ms. Sachs' injuries do not really derive from the asserted "commercial activity" of purchasing a ticket on the Internet. To say that her claims involving a platform accident in

an Austrian railway station are "based on" the commercial activity of purchasing her Eurail Pass stretches the concept of connecting the accident to American commerce beyond recognition.

REASONS FOR GRANTING THE PETITION

ÖBB's petition already cogently explains why it did not engage in commercial activity in the United States through any agent. It explains how the Ninth Circuit misapplied the Foreign Sovereign Immunity Act's definition of "agency" of a "foreign state," contradicting this Court's governing law, such as *First National City Bank* v. *Banco para el Comercio Exterior de Cuba*, 462 U. S. 611 (1983). ÖBB further outlines how Ms. Sachs' claims were not "based upon" any commercial activity in the United States, but rather on alleged torts occurring in Austria. This, too, contradicts this Court's governing law. See, *e.g.*, *Saudi Arabia* v. *Nelson*, 507 U. S. 349 (1993).

ÖBB's petition also describes how the ruling dramatically expands American jurisdiction over foreign sovereigns by erroneously interpreting immunity narrowly and the commercial-activities exception broadly — precisely the opposite of how existing law requires courts to interpret those concepts.

CIT endorses and echoes those arguments. From CIT's vantage, however, this litigation presents issues not merely in an "American case" but rather needs to consider European viewpoints and applicable law as well.

I.
THE EUROPEAN PERSPECTIVE: MS. SACHS HAD AMPLE REMEDIES IN EUROPE AND THUS NO NEED TO RESORT TO AMERICAN JURISDICTION

Underlying the Ninth Circuit's opinion may have been the unexpressed fear that without a means to overcome sovereign immunity, Americans like Ms. Sachs would lack redress for injuries suffered on European railways. That notion is wholly unfounded.

Ms. Sachs' intended journey from Austria to the Czech Republic is subject to the Convention Concerning International Carriage by Rail (COTIF), which governs rail travel in nearly 50 nations in Europe, Caucasia, the Maghreb, and the Middle East. Both Austria and the Czech Republic ratified the Convention and it is thus mandatory for all international rail journeys between the two countries.

The Convention's Appendix A sets forth the Uniform Rules concerning the Contract for International Carriage of Passengers by Rail (CIV, for *Convention Internationale pour le transport des Voyageurs*), which contains

detailed provisions governing carrier liability for passengers who suffer delays or accidents. The CIV also details procedural rules determining the jurisdiction and applicable national law in civil litigation.

The CIV's liability system is a modern system of law that strikes a fair balance between the interests of passengers and carriers. It is well accepted in the railway business, similar to how the Montreal Convention governs international air travel and the Athens Convention covers international sea travel. Since December 2009 it has also become applicable as domestic law in the member states of the European Union. See Regulation (EC) No. 1371/2007 (on rail passengers' rights and obligations), art. 11 (liability for passengers, citing the CIV).

The CIV's article 5 provides that "any stipulation which, directly or indirectly, would derogate from the CIV shall be null and void." In Ms. Sachs' case, her Eurail Pass was subject to the mandatory provisions of the CIV.

The CIV makes clear that a rail passenger injured in an accident may hold liable the carrier that was contractually bound to provide passenger service. (CIV art. 26, §5.) The CIV provides that the "carrier shall be liable for the loss or damage resulting from the death of, personal injuries to, or any other physical or mental harm to, a passenger, caused by an

accident arising out of the operation of the railway and happening while the passenger is in, entering or alighting from railway vehicles whatever the railway infrastructure used." (CIV art. 26, §1.) A carrier may raise the "fault of the passenger" as a defense. (CIV art. 26, §2.) In this case, ÖBB was the carrier, and thus would be 100% liable unless it could reduce its liability by proving some percentage of fault by Ms. Sachs.

The CIV also outlines types of recoverable damages for personal injuries. (CIV art. 28.) For Ms. Sachs, these could include necessary costs for medical treatment and transport, compensation for financial loss caused by a total or partial inability to work (e.g., loss of earnings and future earnings), and expenses incurred to cover her increased needs in light of her injuries.

Additionally, the CIV expressly allows supplemental damages for bodily injury as provided under the national law of the jurisdiction where the action is brought. (CIV art. 29.) These could include, for example, *pretium doloris* (pain and suffering damages) and compensation for impairment to the enjoyment of life.

Articles 56 and 57 outline which court has jurisdiction (i.e., the domicile of the defendant) and explicitly exclude courts outside the member states of the Intergovernmental

Organization for International Carriage by Rail (OTIF). In this case, only Austrian courts would have jurisdiction.

OTIF, the international organization responsible for establishing and developing the COTIF, has published commentary to the Convention and its Appendixes for use as an aid in interpreting the Convention. See Vienna Convention on the Law of Treaties art. 32 (supplementary means of interpretation). That commentary explains, under CIV article 57, why the OTIF member states decided to exclude the jurisdiction of other states' courts, referring explicitly to the situation of American citizens traveling in Europe.

CIT concludes that international passengers contracting with railways within the COTIF's scope are bound by the Convention. The same, of course, is true for the railways — they cannot choose the applicable law, but are bound by the Convention as well. This equality serves the interests of both passengers and carriers.

As CIT sees it, Ms. Sachs could and should have filed suit in Austria, where the accident occurred and where the courts would have been competent to fairly hear and resolve her case, and award damages under the Convention, the CIV, and Austrian law.

To put this position in further perspective, CIT emphasizes that any *European* passenger coming from a country other than Austria would have been in the same position as Ms. Sachs: E.g., a Portuguese passenger would have had to sue ÖBB in Austria, not at home in Portugal. This rule is widely accepted internationally and should hold true for passengers contracting with European carriers for European voyages, regardless of where they are from or where they were located when they formed a contract by purchasing a ticket (even, as in this case, when using the Internet). This accords with the general principle of international law that contractual disputes between private parties should be venued in the defendant's domicile. That has been the law for hundreds of years. The Ninth Circuit's analysis places the American approach well outside international standards.

II.
THE NINTH CIRCUIT ERRED IN FINDING AGENCY THROUGH MULTIPLE SUBAGENTS NOT UNDER ÖBB'S CONTROL

CIT disputes that ÖBB engaged in commercial activity in the United States. The district court and original Ninth Circuit panel correctly recognized that the connection between ÖBB and the American travel company Rail Pass Experts (RPE), from which Ms. Sachs

purchased a Eurail Pass over the Internet, was too attenuated. In fact, the connection in this case, and in most similar situations, is even weaker than it appears.

The Ninth Circuit's en banc opinion notes that while at home in California, Ms. Sachs' purchased her Eurail Pass over the Internet from RPE, located in Massachusetts. What the opinion does not note is that RPE was a subagent of Flight Centre Travel Group Limited, a company based in Brisbane, Australia, which bills itself as the "world's largest travel agency." (See www.FlightCentre.com.) Flight Centre acted as the general sales agent for the Eurail Group G.I.E. (www.EurailGroup.org), an association of 30 European railways (29 of which are CIT members) responsible for the marketing and management of Eurail products, notably Eurail Passes such as the one bought by Ms. Sachs.[2]

Thus there is actually a chain of three purported "subagents" — based in three different countries on three different continents — separating Ms. Sachs and ÖBB:

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[2] In contrast to individual point-to-point tickets, Eurail Passes, which started in 1959, are special tickets that allow non-Europeans unlimited passage for a set period of time on normally scheduled trains operated by the participating railways.

RPE in America, Flight Centre in Australia, and Eurail in the Netherlands. Although this fact may be dehors the limited appellate record in this particular case, it remains generally relevant to CIT's members because this arrangement is not only common, but is more or less an industry norm.

As Judge O'Scannlain's dissenting opinion notes, a significant level of control — amounting to an alter ego relationship — is necessary before a principal may be saddled with the acts of an alleged agent in this context. (App. to Pet. for Cert. 51–56.) Here, however, no single railway member controls Eurail; nor does any railway exert control over the general travel agency companies that Eurail works with to market and sell Eurail Passes, let alone over the various subagents. In light of the reality of this arrangement, it simply makes no sense to conclude that ÖBB, several steps removed, was conducting commercial activity in the United States.

This is not to say that international law negates agency liability entirely or in general. To the contrary, CIV article 51 imputes liability to a carrier for "servants and other persons whose services [are used] for the *performance of the carriage* "; and similarly article 39 imposes liability where a "carrier has entrusted the *performance of the carriage* to a substitute carrier " (emphasis added). But

note that such imputed liability must relate to the actual "performance of the carriage," not matters beyond the immediate control of the railway, such as retail ticketing services.

If the ruling stands, CIT will be forced to advise its members that they may be drawn into American courts by virtue of ticket sales by third-party subagents. That is likely to fundamentally alter the way Eurail Passes are marketed and sold, to the detriment of American travelers.

III.
A RAILWAY'S "COMMERCIAL ACTIVITY" IS TRANSPORTATION SERVICES, NOT TICKET SALES; THE ACCIDENT HERE BEARS NO CONNECTION TO THE TICKETING PROCESS

The "commercial activity" exception to foreign sovereign immunity requires that the foreign sovereign engage in commercial activity in the U.S. Here, ÖBB did not engage in any such commercial activity. The Ninth Circuit's analysis rests on the conclusion that the sale of tickets via agents via the Internet was sufficient commercial activity. CIT disagrees.

The "commercial activity" of European railways is providing passenger and freight carriage in Europe. In so doing, they are subject to numerous regulations at the international level, European Union level, and

national level. The sale of tickets on the Internet (by entities other than the railway) cannot be sufficient for these companies to become subject to foreign jurisdictions around the world. Their core activities linked to passenger service are provided exclusively in Europe, and are regulated by specific laws and conventions that should not be bypassed by lawsuits in courts outside Europe.

In CIT's view, the sale of a ticket is merely the formation of a carriage contract between a passenger and carrier. The actual service to be provided is the carriage itself. The ticket sale has little role in the performance of the contract, let alone any alleged negligence in performance. The sale can happen anywhere on the Internet, while the carriage can only be provided in a specific area by a specific carrier in Europe. Venue for disputes regarding a carrier's performance of its transportation duties should be determined by where that true primary service was rendered and not by the "place" where the contract was formed.

Furthermore, as Chief Judge Kozinski analyzed the situation, because Ms. Sachs' case "arises from events that transpired entirely in Austria," it is not "based upon" the commercial activity of ticket sales in the United States (App. to Pet. for Cert. 62 ["This would be true even if Austria were itself selling train tickets from a kiosk in Times Square."].)

CONCLUSION

This case is of great significance to foreign sovereigns, even those outside the transportation realm. The Ninth Circuit's ruling ignores this Court's precedent and conflicts with other courts and international law. This radical deviation from existing law will have harmful consequences. If allowed to stand, American courts will have to resolve disputes that have essentially no connection to the United States. Moreover, faced with the potential for having to defend personal injury actions in American courts, foreign railways will alter their business and ticketing practices in ways that will undoubtedly inconvenience American travelers. CIT urges this Court to grant certiorari and to reverse the Ninth Circuit's opinion.

Respectfully submitted,

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JOINT APPENDIX

Supreme Court, U.S.
FILED
APR 17 2014
OFFICE OF THE CLERK

No. 13-1067

In The Supreme Court of the United States

OBB PERSONENVERKEHR AG,

Petitioner,

v.

CAROL P. SACHS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed: March 5, 2014
Petition For Certiorari Granted: January 23, 2015

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U.S. District Court
Northern District of California
Civil Docket for Case No. 3:08-cv-01840-VRW

Sachs v. Republic of Austria, et al.

Date Filed	#	Docket Text
04/07/2008	1	COMPLAINT; summonses issued against Republic of Austria, OBB Holding Group, OBB Personenverkehr AG (Filing fee $ 350, receipt number 44611002030). Filed by Carol P. Sachs. (slh, COURT STAFF) (Filed on 4/7/2008) (ga, COURT STAFF). (Entered: 04/10/2008)
03/22/2010	30	NOTICE of Appearance by Juan C. Basombrio (Basombrio, Juan) (Filed on 3/22/2010) (Entered: 03/22/2010)
04/07/2010	35	AMENDED COMPLAINT against OBB Holding Group, OBB Personenverkehr AG, Republic of Austria. Filed by Carol P. Sachs. (Becker, Geoffrey) (Filed on 4/7/2010) (Entered: 04/07/2010)
04/13/2010	36	ACKNOWLEDGEMENT OF SERVICE Executed *as of March 22, 2010* Acknowledgement filed by OBB Personenverkehr AG. (Basombrio, Juan) (Filed on 4/13/2010) (Entered: 04/13/2010)

06/21/2010	43	MOTION to Dismiss *and Points and Authorities* filed by OBB Personenverkehr AG. Motion Hearing set for 9/2/2010 10:00 AM in Courtroom 6, 17th Floor, San Francisco. (Attachments: # 1 Proposed Order)(Bulthuis, Zachary) (Filed on 6/21/2010) (Entered: 06/21/2010)
06/21/2010	44	Declaration of Andreas Fuchs in Support of 43 MOTION to Dismiss *and Points and Authorities* filed by OBB Personenverkehr AG. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit)(Related document(s) 43) (Bulthuis, Zachary) (Filed on 6/21/2010) (Entered: 06/21/2010)
06/21/2010	45	Declaration of Dr. Georg Kodek in Support of 43 MOTION to Dismiss *and Points and Authorities* filed by OBB Personenverkehr AG. (Related document(s) 43) (Bulthuis, Zachary) (Filed on 6/21/2010) (Entered: 06/21/2010)
06/21/2010	46	NOTICE by OBB Personenverkehr AG re 43 MOTION to Dismiss *and Points and Authorities INTENT TO RELY ON FOREIGN LAW* (Bulthuis, Zachary) (Filed on 6/21/2010) (Entered: 06/21/2010)
10/15/2010	57	DECLARATION of Geoffrey Becker in Opposition to OBB Personenverkehr AG's,motion to dismiss filed by Carol P. Sachs.

(Becker, Geoffrey) (Filed on 10/15/2010) Modified on 10/19/2010 (far, COURT STAFF). (Entered: 10/15/2010)

10/15/2010 58 POINTS AND AUTHORITIES in Opposition to Motion to Dismiss filed by OBB Personenverkehr AG filed by Carol P. Sachs. (Becker, Geoffrey) (Filed on 10/15/2010) Modified on 10/19/2010 (far, COURT STAFF). (Entered: 10/15/2010)

10/18/2010 59 DECLARATION of Carol P. Sachs in opposition to motion to dismiss filed by Carol P. Sachs. (Becker, Geoffrey) (Filed on 10/18/2010) Modified on 10/19/2010 (far, COURT STAFF). (Entered: 10/18/2010)

11/04/2010 61 Reply to Opposition *to 43 OBB Personenverkehr AG's Motion to Dismiss the Complaint* filed by OBB Personenverkehr AG. (Attachments: # 1 Affidavit)(Basombrio, Juan) (Filed on 11/4/2010) Modified on 11/5/2010 (mjj2, COURT STAFF). (Entered: 11/04/2010)

11/18/2010 63 Minute Entry: Motion Hearing held on 11/18/2010 before Judge Vaughn R Walker. Counsel for Plaintiff(s): Geoffrey Becker. Counsel for Defendant(s):Juan Basombrio. PROCEEDINGS:OBBs Motion to Dismiss For Lack of Jurisdiction, doc #43 and doc #51.The court heard

argument from counsel; the court submitted the matter; the court to issue written order. (Court Reporter Christine Triska.) (cgk, COURT STAFF) (Date Filed: 11/18/2010) (Entered: 11/18/2010)

11/22/2010 64 ORDER directing plaintiff to file supplemental memorandum re Doc #43 on or before December 17, 2010. OBB may file a response on or before January 14, 2010, at which time the motion to dismiss will be deemed submitted. (vrwlc1, COURT STAFF) (Filed on 11/22/2010) (Entered: 11/22/2010)

12/06/2010 65 Transcript of Proceedings held on November 18, 2010, before Judge Vaughn R. Walker. Court Reporter/Transcriber Christine A. Triska, Telephone number 650-743-8425; christinetriska@sbcglobal.net. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerks Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction.After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. Release of Transcript

		Restriction set for 3/7/2011. (cat, COURT STAFF) (Filed on 12/6/2010) (Entered: 12/06/2010)
12/17/2010	66	SUPPLEMENTAL BRIEFING re 51 motion to dismiss filed by Carol P. Sachs. (Becker, Geoffrey) (Filed on 12/17/2010) Modified on 12/20/2010 (far, COURT STAFF). (Entered: 12/17/2010)
12/18/2010	67	AMENDED SUPPLEMENTAL BRIEFING re 51 motion to dismiss filed by Carol P. Sachs. (Becker, Geoffrey) (Filed on 12/18/2010) Modified on 12/20/2010 (far, COURT STAFF). (Entered: 12/18/2010)
12/28/2010	68	Ex Parte MOTION to Dismiss for Lack of Jurisdiction *Application for Permission to File Exhibit* filed by Carol P. Sachs. Motion Hearing set for 11/18/2010 09:00 AM in Courtroom 6, 17th Floor, San Francisco before Hon. Vaughn R. Walker. (Becker, Geoffrey) (Filed on 12/28/2010) (Entered: 12/28/2010)
01/03/2011	69	Memorandum in Opposition re 68 Ex Parte MOTION to Dismiss for Lack of Jurisdiction *Application for Permission to File Exhibit* filed by OBB Personenverkehr AG. (Basombrio, Juan) (Filed on 1/3/2011) (Entered: 01/03/2011)

01/13/2011	70	Brief re 43 MOTION to Dismiss *and Points and Authorities Supplemental Brief* filed by OBB Personenverkehr AG. (Related document(s) 43) (Basombrio, Juan) (Filed on 1/13/2011) (Entered: 01/13/2011)
01/28/2011	71	ORDER granting 43 Motion to Dismiss; granting 51 Motion to Dismiss; denying 68 Ex parte motion for leave to file exhibits. The clerk is directed to terminate all motions and close the file.(vrwlc3, COURT STAFF) (Filed on 1/28/2011) (Entered: 01/28/2011)
02/23/2011	72	NOTICE OF APPEAL as to 71 Order on Motion to Dismiss, Order on Motion to Dismiss/Lack of Jurisdiction by Carol P. Sachs. Filing fee $ 455, Receipt Number 34611056674. (far, COURT STAFF) (Filed on 2/23/2011) (Entered: 02/24/2011)

U.S. Court of Appeals
for the Ninth Circuit
Civil Docket for Case No. 11-15458

Sachs v. Republic of Austria, et al.

Date Filed	#	Docket Text
05/31/2011	7	Submitted (ECF) Opening brief for review. Submitted by Appellant Carol P. Sachs. Date of service: 05/31/2011. [7768885] – [COURT UPDATE: Replaced PDF of brief (now searchable and includes Statement of Related Cases.) Resent NDA. 06/01/2011 by DB] (GB) [Entered: 05/31/2011 02:53 PM]
07/07/2011	13	Submitted (ECF) Answering brief for review. Submitted by Appellee OBB Personenverkehr AG. Date of service: 07/07/2011. [7812013] (JCB) [Entered: 07/07/2011 03:44 PM]
07/21/2011	17	Submitted (ECF) Reply brief for review. Submitted by Appellant Carol P. Sachs. Date of service: 07/21/2011. [7828440] (GB) [Entered: 07/21/2011 01:48 PM]
06/22/2012	25	Filed order (RONALD M. GOULD, RICHARD C. TALLMAN and CARLOS T. BEA) The parties shall file supplemental letter briefs addressing the significance, if any, of Sun v. Taiwan, 201 F.3d 1105 (9th Cir. 2000), to the resolution of this case. Parties shall file simultaneous

letter briefs on or before fifteen (15) days from the filed date of this order. The briefs shall not exceed ten (10) pages (double-spaced) or 2,800 words and may be in the form of letters to the clerk of this court. Parties who are registered for ECF must file the supplemental brief electronically without submission of paper copies. Parties who are not registered ECF filers must file the original supplemental brief plus 7 paper copies. [8224625] (WL) [Entered: 06/22/2012 10:13 AM]

06/28/2012 27 Submitted (ECF) Letter brief for review. Submitted by Appellant Carol P. Sachs. Date of service: 06/28/2012. [8231688] (GB) [Entered: 06/28/2012 01:31 PM]

07/09/2012 29 Submitted (ECF) Letter brief for review. Submitted by Appellee OBB Personenverkehr AG. Date of service: 07/09/2012. [8242906] – [COURT UPDATE: Attached corrected brief. Edited docket text to reflect correct brief type (Letter). Resent NDA. 07/10/2012 by RY] (JCB) [Entered: 07/09/2012 05:28 PM]

09/26/2012 31 FILED OPINION (RONALD M. GOULD, RICHARD C. TALLMAN and CARLOS T. BEA) AFFIRMED. Judge: RMG Dissenting, Judge: RCT Authoring, Judge: CTB Concurring. FILED AND ENTERED

JUDGMENT. [8338000] (RP) [Entered: 09/26/2012 10:59 AM]

10/10/2012 32 Filed (ECF) Appellant Carol P. Sachs petition for panel rehearing and petition for rehearing en banc (from 09/26/2012 opinion). Date of service: 10/10/2012. [8353646] – [COURT UPDATE: Attached corrected petition (footnote). Resent NDA. 10/11/2012 by RY] (GB) [Entered: 10/10/2012 09:37 AM]

10/12/2012 33 Filed order (RONALD M. GOULD, RICHARD C. TALLMAN and CARLOS T. BEA) Defendants-Appellees are directed to file a response to Plaintiff-Appellant's petition for panel rehearing and petition for rehearing en banc filed with this court on October 10, 2012. The response shall not exceed 15 pages or 4200 words and shall be filed within 21 days of the date of this order. Parties who are registered for ECF must file the response electronically without submission of paper copies. Parties who are not registered ECF filers must file the original response plus 50 paper copies. [8357906] (WL) [Entered: 10/12/2012 10:32 AM]

11/02/2012 34 Filed (ECF) Appellee OBB Personenverkehr AG response to Combo PFR Panel and En Banc (ECF Filing),Combo PFR Panel and

		En Banc (ECF Filing) for panel and en banc rehearing, for panel and en banc rehearing (statistical entry). Date of service: 11/02/2012. [8386288]. (JCB) [Entered: 11/02/2012 12:40 PM]
01/25/2013	35	Filed En Banc Order for PUBLICATION KOZINSKI, Chief Judge: Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit. [8488011] (PH) [Entered: 01/25/2013 10:06 AM]
03/13/2013	49	Filed (ECF) Appellee OBB Personenverkehr AG citation of supplemental authorities. Date of service: 03/13/2013. [8548726] (JCB) [Entered: 03/13/2013 10:07 AM]
03/26/2013	51	Filed order (ALEX KOZINSKI, STEPHEN R. REINHARDT, DIARMUID F. O'SCANNLAIN, BARRY G. SILVERMAN, SUSAN P. GRABER, KIM MCLANE WARDLAW, RAYMOND C. FISHER, RONALD M. GOULD, MARSHA S. BERZON, JOHNNIE B. RAWLINSON and ANDREW D. HURWITZ) The parties shall file supplemental letter briefs addressing whether the definition of "agency or instrumentality of a foreign state" in 28 U.S.C. § 1603(b) of the Foreign

Sovereign Immunities Act limits who is an agent for purposes of the commercial-activity exception under 28 U.S.C. § 1605(a)(2), and if so, how. Appellee's brief shall be filed no later than 14 days from the filing of this order. Appellant's brief shall be filed within 14 days thereafter. Appellee may file an optional reply brief within 7 days of the filing of Appellant's brief. Principal briefs may not exceed 15 pages (double-spaced) or 4,200 words. The optional reply brief may not exceed 10 pages (double-spaced) or 2,800 words. [8565291] (KKW) [Entered: 03/26/2013 04:11 PM]

04/08/2013 52 Submitted (ECF) Letter Brief for review. Submitted by Appellee OBB Personenverkehr AG. Date of service: 04/08/2013. [8581537] (JCB) [Entered: 04/08/2013 02:24 PM]

04/22/2013 54 Submitted (ECF) Letter Brief for review. Submitted by Appellant Carol P. Sachs. Date of service: 04/22/2013. [8599184] (GB) [Entered: 04/22/2013 03:47 PM]

04/26/2013 57 Submitted (ECF) Letter Brief for review. Submitted by Appellee OBB Personenverkehr AG. Date of service: 04/26/2013. [8606314] – [COURT UPDATE: Changed brief type to Letter brief, resent notice. 04/29/2013 by ASW] (JCB) [Entered: 04/26/2013 11:14 AM]

12/06/2013	59	FILED OPINION (ALEX KOZINSKI, STEPHEN R. REINHARDT, DIARMUID F. O'SCANNLAIN, BARRY G. SILVERMAN, SUSAN P. GRABER, KIM MCLANE WARDLAW, RAYMOND C. FISHER, RONALD M. GOULD, MARSHA S. BERZON, JOHNNIE B. RAWLINSON and ANDREW D. HURWITZ) REVERSED AND REMANDED. Opinion by Judge Gould; Dissent by Judge O'Scannlain; Dissent by Chief Judge Kozinski. FILED AND ENTERED JUDGMENT. [8891426] (RP) [Entered: 12/06/2013 07:10 AM]
12/12/2013	60	Filed (ECF) Appellee OBB Personenverkehr AG Motion to stay the mandate. Date of service: 12/12/2013. [8899928] (JCB) [Entered: 12/12/2013 04:20 PM]
12/16/2013	61	Filed order (RONALD M. GOULD) Appellee's Motion to Stay the Mandate Pending Petition for Certiorari is GRANTED. Fed. R. App. P. 41(d). Therefore, it is ordered that the mandate is stayed pending the filing of the petition for writ of certiorari in the Supreme Court. The stay shall continue until final disposition by the Supreme Court. [8903386] (WL) [Entered: 12/16/2013 03:05 PM]

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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CAROL P. SACHS, Plaintiff, vs. REPUBLIC OF AUSTRIA, OBB HOLDING GROUP, OBB PERSONENVERKEHR AG Defendants.	]NO. C08-01840 EMC]]**Complaint for Personal Injuries Based on Negligence, Strict Liability and Breach of Implied Warranty of Merchantability and Fitness**]](Filed Apr. 7, 2008)

1. Jurisdiction

The court's jurisdiction to hear this case is based on the diversity of citizenship that exists between the parties and on the fact that the amount in controversy exceeds $75,000. 28 U.S.C. §1332. Jurisdiction is also based on 28 U.S.C.§ 1330 and the fact that the REPUBLIC OF AUSTRIA is a foreign sovereign which owns and/or operates OBB PERSONENVERKEHR

AG, the railway which caused plaintiff's injuries and its holding company, OBB HOLDING GROUP.

2. Intradistrict Assignment

Plaintiff is a resident of Berkeley, California and was a resident of Berkeley when she purchased the railway ticket through defendants' agent, Eurail, and the American based company, The Rail Pass Experts. The ticket was purchased in San Francisco, California on or around March 2, 2007. At all times relevant, OBB PERSONENVERKEHR AG advertised via the world wide web that American citizens can purchase their tickets directly from the OBB PERSONENVERKEHR AG website. Assignment to the Oakland branch of this court is requested for the reason that the accident which is the subject of this lawsuit caused plaintiff's legs to be amputated above the knee. Since she ambulates by wheelchair, the Oakland branch is the preferred venue for trial as it is closer to plaintiff's home.

FIRST CLAIM FOR RELIEF
(Negligence)

1. Plaintiff avers that on April 7, 2007, the Republic of Austria was the owner and/or operator of the Austrian railway company known as OBB PERSONENVERKEHR AG and its holding company OBB HOLDING GROUP. OBB PERSONENVERKEHR AG is the Austrian railway company that agreed to

provide railway transportation to plaintiff while she was visiting Austria in and around April 7, 2007.

2. As a common carrier for hire, defendants, and each of them, were obligated to use the utmost care regarding plaintiff's carriage. This duty was breached on April 7, 2007, when plaintiff was injured while attempting to board the OBB PERSONENVERKEHR AG railcar in Innsbruck, Austria.

3. Defendants, and each of them, negligently moved the train before plaintiff had boarded.

4. Defendants, and each of them, negligently provided an unsafe place for the plaintiff to board the railcar in that there was a gap between boarding platform edge and the train into which a boarding passenger could fall.

5. Defendants, and each of them, negligently failed to warn the plaintiff that there was a gap between the boarding platform edge and the train into which she could fall.

6. Defendants, and each of them, negligently failed to provide supervision at the Innsbruck station to oversee passenger boarding.

7. Defendants, and each of them, negligently failed to stop the train while plaintiff was attempting to board it and negligently locked the railcar doors.

8. As a result of the aforesaid negligence, plaintiff was injured and has suffered economic and non-economic damages in amounts according to proof.

SECOND CLAM FOR RELIEF

(Strict Liability-Design Defect)

9. Plaintiff re-alleges and incorporates by this reference, paragraphs 1 and 8 of the First Claim for Relief as though set forth fully herein.

10. Defendants, and each of them, designed and manufactured the railcars and boarding platform which were made available for plaintiff's use. The railcars and boarding platform were defective in their design in that there were risks inherent in their design which outweighed the benefits of their design as a whole. Said defects in design were present when the railcars and platform were put into the stream of commerce and were not altered in any significant way prior to April 7, 2007.

11. Defendants, and each of them, knew that plaintiff would not inspect the railcars and platform for defects prior to boarding. Plaintiff was using the railcars and platform in a reasonably foreseeable and intended manner

12. The aforesaid defects acted as a substantial factor in bringing about plaintiff's injuries and damages as alleged herein.

THIRD CLAIM FOR RELIEF

(Strict Liability-Design Defect-Failure to Warn)

13. Plaintiff re-alleges and incorporates by this reference, each paragraph of the Second Claim for Relief as though set forth fully herein.

14. The railcars and platform were defective in that warnings about their safe use were not provided even though defendants knew that there were risks of significant personal injury and death from plaintiff's foreseeable and expected use.

15. The aforesaid defect acted as a substantial factor in bringing about plaintiff's injuries and damages as herein alleged.

FOURTH CLAIM FOR RELIEF

(Breach of Implied Warranty of Merchantability)

16. Plaintiff re-alleges and incorporates by this reference, each paragraph of the Second Claim for Relief as though set forth fully herein.

17. Defendants, and each of them entered into a bailment agreement with plaintiff whereby the railcars and platform were bailed to her for her use in traveling from Innsbruck. By reason of this bailment, said defendants warranted that the railcars and platform were reasonably safe for their intended. The warranty was breached in that they were not reasonably safe for their intended use and plaintiff was injured and damaged as herein alleged.

FIFTH CLAIM FOR RELIEF

(Breach of Implied Warranty of Fitness)

18. Plaintiff re-alleges and incorporates by this reference, each paragraph of the Second and Fourth Claims for Relief as though set forth fully herein.

19. Defendants, and each of them, impliedly warranted that the railcars and platform were fit for the purposes for which they were intended to be used.

20. Said railcars and platform were not fit for the purposes for which they were intended to be used and for which they were bailed to the plaintiff. By reason of this failure of fitness, the implied warranty was breached and plaintiff was injured and damaged as herein alleged.

DEMAND FOR RELIEF

1. Plaintiff prays for economic and non-economic damages in all claims for relief according to proof, and for such other and further relief as the court deems proper.

Dated: April 7, 2008

/s/ Geoffrey Becker
Geoffrey Becker
Attorney for Carol P. Sachs, plaintiff

JUAN C. BASOMBRIO (CA#150703)
DORSEY & WHITNEY LLP
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email: basombrio.juan@dorsey.com

Attorneys for Defendant
OBB PERSONENVERKEHR AG

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CAROL P. SACHS, Plaintiff, vs. REPUBLIC OF AUSTRIA; OBB HOLDING GROUP; OBB PERSONENVERKEHR AG, Defendants.	NO. C 08-01840-EMC **DEFENDANT OBB PERSONENVERKEHR AG'S NOTICE OF APPEARANCE** (Filed Mar. 22, 2010)

Please take notice that Juan C. Basombrio of Dorsey & Whitney LLP hereby enters his appearance as counsel for Defendant OBB Personenverkehr AG (hereafter, "Defendant OBB").

Defendant OBB respectfully objects that this District Court lacks subject matter jurisdiction over this action and/or personal jurisdiction over Defendant OBB based on, among other things, the Foreign

Sovereign Immunities Act, 28 U.S.C. sections 1602 et seq., and reserves all other applicable objections and defenses herein. Subject to the same, Defendant OBB will respond to the complaint herein within the time required by 28 U.S.C. section 1608(d).

Defendant OBB understands that Defendants Republic of Austria and OBB Holding Group have not been served.

Dated: March 22, 2010.

Respectfully submitted,

DORSEY & WHITNEY LLP

By /s/ Juan C. Basombrio
Juan C. Basombrio
Attorneys for Defendant
OBB PERSONENVERKEHR AG

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Attorney for Plaintiff, Carol Sachs

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CAROL P. SACHS, Plaintiff, vs. REPUBLIC OF AUSTRIA, OBB HOLDING GROUP, OBB PERSONENVERKEHR AG Defendants. /	NO. C 08-01840 VRW **Amendment to Complaint** (Filed Apr. 7, 2010)

Plaintiff amends the complaint, as follows:

a. The date April 7,2007 is changed to April 27, 2007.

Dated: April 7, 2010

/s/ Geoffrey Becker
Geoffrey Becker
Attorney for Carol P Sachs, plaintiff

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Attorneys for Defendant
OBB PERSONENVERKEHR AG

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CAROL P. SACHS, Plaintiff, vs. REPUBLIC OF AUSTRIA; OBB HOLDING GROUP; OBB PERSONENVERKEHR AG, Defendants.	NO. C 08-01840-WVR **DEFENDANT OBB PERSONENVERKEHR AG'S NOTICE OF ACKNOWLEDGMENT OF SERVICE** (Filed Apr. 13, 2010)

Defendant OBB Personenverkehr AG ("Defendant OBB") hereby acknowledges receipt of service of the Summons and Complaint as of the date when it filed its Notice of Appearance herein, March 22, 2010.

Pursuant to 28 U.S.C. § 1608(d), Defendant OBB has sixty days to respond to the Complaint. Accordingly, Defendant OBB currently has to and including May 21, 2010 to respond to the Complaint.

As indicated in its Notice of Appearance, Defendant OBB objects to the jurisdiction of this Court based on foreign sovereign immunity and other grounds. Defendant OBB intends to file a motion to dismiss pursuant to F.R.C.P. 12, inter alia.

Defendant OBB understands that Defendants Republic of Austria and OBB Holding Group have not yet been served.

Dated: April 13, 2010

Respectfully submitted,

DORSEY & WHITNEY LLP

By /s/ Juan C. Basombrio
Juan C. Basombrio
Attorneys for Defendant
OBB PERSONENVERKEHR AG

JUAN C. BASOMBRIO (CA#150703)
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Attorneys for Defendant
OBB PERSONENVERKEHR AG

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CAROL P. SACHS, Plaintiff, v. REPUBLIC OF AUSTRIA, OBB HOLDING GROUP, OBB PERSONENVERKEHR AG, Defendants.	NO.: C08-01840 VRW **DECLARATION OF ANDREAS FUCHS IN SUPPORT OF DEFENDANT OBB PERSONENVERKEHR AG'S MOTION TO DISMISS THE COMPLAINT AS AMENDED** (Filed Jun. 21, 2010) **HEARING:** **DATE: SEPTEMBER 2, 2010** **TIME: 10:00 A.M.** **PLACE: COURTROOM 6**

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE AVE., SAN FRANCISCO, CA 94102

DECLARATION OF ANDREAS FUCHS

I, Andreas Fuchs, declare that if called as a witness in this action, I could and would competently testify to the following based on my personal knowledge:

1. I am a member of the Board of Management of OBB Personenverkehr AG ("OBB"), a defendant herein, and I am authorized to make and make this declaration on its behalf.

2. OBB Holding AG ("OBB Holding") is a joint-stock company organized under Austrian law and created by the Republic of Austria pursuant to section 2 of the Austrian Federal Railways Act BBG. The sole shareholder of OBB Holding is the Austrian Federal Ministry of Transport, Innovation and Technology ("Ministry"). OBB Holding has no private shareholders.

3. OBB Holding is the parent and holding company of a number of other Austrian joint stock companies, including but not limited to OBB, OBB Infrastruktur AG, and others. OBB Holding provides policy direction (policy is established by the Ministry)

to these joint stock companies, and the joint stock companies implement policy in their respective areas of responsibility and function. OBB Holding owns 100% of the stock of OBB. OBB also has no private shareholders.

4. OBB is a separate juridical entity, within the holding company structure described above. That structure has been developed to comply with requirements imposed by the European Union, mainly that of organizational separation in the areas of infrastructure and transportation. OBB has its own management and employees separate from OBB Holding. OBB has a Managing Board that is responsible for the day-to-day business of OBB. OBB also has a Supervisory Board, appointed by OB Holding, which performs certain periodic overseeing and audit functions. Therefore, although OBB is ultimately owned by the Ministry, it is empowered with autonomy to conduct its business subject to policies established by the Ministry and regulations created by statute or administrative process.

5. The responsibilities and functions of OBB are set dictated by law, under section 6 of the Austrian Federal Railways Act. Mainly, OBB is responsible for the operation of passenger rail service within Austria. OBB provides a service for the benefit of the public. OBB is statutorily a public railway company. The operations of public railway companies are regulated by the Austrian Railway Act EisbG.

6. OBB is subject to the jurisdiction of the Court of Audit of the Republic of Austria. The function of the Court of Audit is to periodically audit the operations of public companies of the Austrian government. In this regard, OBB, as do other public companies, also has reporting requirements to the Court of Audit. OBB also is required to make periodic reports to the Ministry regarding its operations.

7. The manner in which OBB carries on its functions and provides services, including with respect to railway safety, is also regulated by statute and/or subject to review and approval by the Ministry. The safe transport of passengers is an important public interest of the Austrian government.

8. Other aspects of OBB's functions and operations also are governed by statute. For example, the legal relationship between OBB and its passengers is regulated by the Austrian Transport Law. In order to deviate from the provisions of said act, OBB would require approval of the Ministry.

9. Further, as a separate legal entity, OBB is entitled to enter into contracts. These contractual relationships, however, are subject to Austrian railway law provisions and regulations contained in European law, public international law, as well as various treaties.

10. Pursuant to section 30 of the Austrian Railway Act EisbG, OBB has the power to appoint railway employees as "railway police," and these employees' duties are to monitor the safety and order

of the railway operations. These OBB employees have police powers, such as the power to arrest.

11. OBB is represented in court in Austria by the Attorney General of the Republic of Austria ("Finanzprokuratur").

12. OBB is not subject to an income or corporate tax. Compensation for the performance of public-benefit transport services is considered to be in the public interest and no tax is payable on such compensation by OBB. OBB turns all profits, if there are profits in the calendar year – sometimes there are not, over to OBB Holding, which would in turn forward them to the Austrian government. OBB is subject only to a VAT (Value Added Tax) which is passed on to its passengers.

13. Pursuant to Section 47 of the Austrian Railway Act BBG, the Republic of Austria must ensure that the required funds for the performance of its functions are available to OBB Holding's companies, like OBB. OBB receives funds for its operations from the Republic, the federal states and municipalities.

14. Railway platforms are considered to be railway facilities under section 10 of the Austrian Railway Act EisbG and are categorized as railway infrastructure under section 10a of that act. OBB Infrastruktur AG (another company under the OBB Holding umbrella) is responsible for their planning, construction and operation under the Austrian Railway Act BBG. After construction, OBB Infrastruktur

AG makes the platforms available for their operation and maintenance.

15. The construction, operation and maintenance of railway platforms are subject to building and operating permits issued by the Federal Ministry of Transport, Innovation and Technology under section 31ff of the Austrian Railway Act EisbG. Specifically, the construction, operation and maintenance of railway platforms are regulated by various acts and regulations, including but not limited to the following:

a. "Eisenbahngesetz" (Austrian Railway Act) 1957.

b. "Eisenbahnverordnung" (Austrian Railway Regulation) 2003.

c. DV V2 "Signalvorschrift" (regulation regarding signals) as amended on 10-12-2006.

d. DV V3 "Betriebsvorschrift" (regulation regarding operation) as amended on 10-12-2006.

e. ZSB "Zusatzbestimmungen zur Signal- und Betriebsvorschrift" (additional provisions for regulations regarding signals and operation) as amended on 10-12-2006.

f. "Streckenliste" (route list) 101 04 Wörgl – Innsbruck main station.

g. "Betriebsstellenbeschreibung" (description) of Innsbruck main station.

h. B 50 chapter or section 13 "Bahnsteige" (platforms), issue date 01-02-2006.

i. B 53 "Gestaltung von Oberbauanlagen" (design of track systems), section '7 Bahnsteige (platforms), issue date 01-10-1983.

j. DV B 20 "Bahnaufsichts und Bahnerhaltungsdienst" (railway supervisory and maintenance service).

16. The design and construction of platforms also is regulated by chapter B50 and section 13 of "Bahnsteige" (platforms), chapter B 53 "Gestaltung von Oberbauanlagen" (design of track systems), and section 7 "Bahnsteige" (platforms) as amended.

17. Traffic operation (that is, the operation of trains) at the Innsbruck main station, as well as at the adjoining routes, at the time of the incident that is the subject of this action, also was regulated by rule V2 "Signalvorschrift" (regulation regarding signals), as amended in the 13th version (17-06-2007) and rule V3 "Betriebsvorschrift" (regulation regarding operation), as amended in the 12th version (17-06-2007), as well as by the ZSB "Zusatzbestimmungen zur Signal und Betriebsvorschrift" (additional provisions for the regulations regarding signals and operation), as amended in the 12th version (17-06-2007) and the "Streckenliste" (route list) 101 04 Wörgl – Innsbruck main station.

18. Plaintiff's counsel has produced to OBB's counsel a purported receipt (order date of March 2, 2007) for the plaintiff's purchase of the alleged Eurail

Pass (a copy of said document produced by plaintiff's counsel is attached hereto as Exhibit 1). OBB did not sell the subject rail pass to the plaintiff. Instead, the document states that the receipt is from The Rail Pass Experts located in Newton Centre, Massachusetts, United States. The Rail Pass Experts is not an authorized agent of OBB nor does it have any legal relationship to OBB. The Rail Pass Experts may be, presumably, a subagent of a general sales agent accredited by The Eurail Group and, therefore, able to sell Eurail passes (likely at higher rates than those available from Eurail directly).

19. The Eurail Group (commonly known as Eurail) is an association, organized under the laws of Luxemburg, with headquarters in Luxemburg. The Eurail Group is a separate legal entity. OBB is a member of The Eurail Group, together with similar railway transportation providers in other European nations. The Eurail Group has its own management and employees. The Eurail Group also has an assembly comprised of its members which is convened for certain reasons. Among the functions of The Eurail Group is the marketing and sale of rail passes.

20. Plaintiff's counsel has produced to OBB's counsel a purported Eurail Pass coupon (a copy of said document produced by plaintiff's counsel is attached hereto as Exhibit 2). Item no. 13 of said rail pass document terms and conditions states: "This Pass does not guarantee a seat on a train or passage on a ship, unless a reservation is secured in advance. For certain trains and ships reservation is compulsory."

Item no. 14 states: "Fees for seat reservations, sleeping accommodation, meals and other extra services are not included and must be paid separately."

21. The Complaint, as amended, alleges that the subject incident occurred at the train station in Innsbruck, Austria on April 27, 2007. Based on my review of OBB records, it appears that the plaintiff intended to travel from Innsbruck to Prague on that day. OBB records indicate that on April 25, 2007 and in Innsbruck (see Exhibit 3 hereto, which is a true and correct copy of said OBB record of Visa transaction), the plaintiff used a Visa card and paid 30.90 Euros to OBB, 30.90 Euros of which was for a couchette bed reservation in the subject train from Innsbruck to Prague. As indicated in the terms and conditions of the rail pass (Exhibit 2), although the plaintiff could have boarded the train with just her rail pass (she would have had to find an unoccupied regular seat instead), the plaintiff instead opted to purchase a couchette bed reservation on that train. Without making that additional payment, the plaintiff would not have been able to board the train and make the specific trip she planned on a couchette bed.

22. I have reviewed the records of OBB, and they indicate that the subject incident took place on April 27, 2007, when plaintiff Carol P. Sachs improperly attempted to board the subject train after all passengers had boarded, the conductor had dispatched the train, and the train was in motion.

23. At the time of the subject incident and to this date, OBB does not have offices, employees or bank accounts in the United States including within the State of California. OBB does not have a license to do business in the United States including within the State of California. OBB is not regulated in the United States and is not subject to United States law.

24. OBB does not waive its sovereign immunity from suit in the United States.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 17 day of June 2010, in Vienna, Austria.

/s/Andreas Fuchs
ANDREAS FUCHS

FUCHS DECLARATION

EXHIBIT 1

[LOGO]
The Rail Pass Experts
48 Glen Avenue
Newton Center, MA 02459
United States
1-888-RAILPASS

Ship To:
Ms Carol Sachs
3134 Eton Avenue
Berkeley, CA 94705
United States
510 684-6199

Order ID: RC 122351
Order Status: PAYMENT APPROVED
Your Order is being Processed!

Order Date:
3/2/2007 7:00:24 PM
Depart Date:
09 -MAR-2007
Ship Via: DHL/FedEx 2-3 business days
Email: sachs.carol@epa.gov

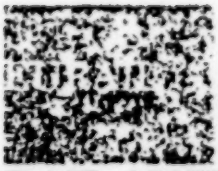
Products:	**Eurall Austria-Czech Republic Pass 4 days in 2 months – 1st Class**	
	Ms Carol Sachs, Adult, United states	$225.00
	Pass Subtotal	$225.00
	Pass Security Cost	$14.00
	Product Total	**$239.00**
Subtotal:		**$239.00**
Shipping Cost:		**$14.00**
Amount Paid:		**$253.00**
TOTAL DUE:		**$0.00**

Notes:	41*1264 03/08 Carol Sachs 3134 Eton Avenue Berkeley, California 94705 US 253.00.

RailSaver – RailSaver * 3/2/2007 7:00:36 PM

FUCHS DECLARATION

EXHIBIT 2



CIV No.
F00000000533685

|EL

F	RPE/RC	F
C	_____	C
L	6 MAR 2007	L

Issuing Stamp

RAIL AUSTRIA – CZECH REPUBLIC PASS

In **Austria – Czech Republic**

04 days within 2 Months 1st Class Adult RC 122351

DAY |__| |__| |__| Name:
DAY MONTH YEAR SACHS, C MS

DAY |__| |__| |__| Country of
DAY MONTH YEAR residence: USA

Passport #: _____

MUST BE VALIDATED BEFORE **6 SEP 2007**

1 2 3 4
|__| |__| |__| |__|
|__| |__| |__| |__|

Validating Stamp

This coupon is only valid with Eurail cover and your passport
E 0533685

USD 225.00
EUR 171.00

entre les textes en anglais et en français, seul celui en anglais sera considere.

[Illegible] [ ]nal, non-transferable and only valid upon presentation of a passport or a valid travel document replacing the passport. 2. This Pass may not be used by residents of Europe, the Russian Federation, Turkey, [illegible]. 3. The coupon(s) in the booklet form, together with the cover, a single travel document. Coupon(s) without a cover and/or without a date stamp and/or imprint of the issuing office are invalid. 4. A Senior [illegible] [ ]ers aged 60 and over (on the first day of validity of their Pass). A Youth Pass is only valid for travelers under 26 years of age (on the first day of validity of their Pass). A child Pass can only be used by travelers [illegible] the first day of validity of their Pass). Different ages may apply for children traveling on a Eurail National Pass. A Saver Pass is valid for all persons listed on the control voucher. 5. This Pass is valid in the [illegible] (1st class Passes are also valid in 2nd class). For 1st class travel with a 2nd class Pass, the full difference between 1st and 2nd class fare on the respective route must be paid. 6. This Eurail Pass is valid in the [illegible] Pass. When no countries are mentioned, the Pass is valid in Austria (including Liechtenstein), Belgium, Denmark, Finland, France (including Monaco), Germany, Greece, Hungary, Ireland (Republic), Italy, [Illegible] [ ]ds, Norway, Portugal, Romania, Spain, Sweden and Switzerland. **Certain trains may transit through a country not covered by your Pass.** In this case, an additional ticket must be purchased. Your Pass may [illegible] [ ]ing lines[1)] 7. Before travel begins, within 6 months of the issuing date, the first and last day of validity of the Pass and

your passport number must be filled in; before departure by your travel agent or once [illegible] [ ]lway official, and NOT by yourself.

[Illegible] the time period indicated on the Pass. 9. If the Pass is valid for a specific number of travel days, within a longer period of overall validity, the Pass holder may choose these days at his own convenience. The [illegible] chosen date of each travel day on the pass before boarding the first train/ship of that day. This date must be entered by the traveler in blue or black ink or with a blue or black ballpoint pen in the corres- [illegible] [ ]r. Dates must be inserted in sequential order in the following manner, for example: May 27 = 27/05. Pass-holders can travel from midnight until midnight on the selected day. If the trip starts in a direct over- [illegible] 19h00 (7pm), the next day's date must be entered; travel between 19h00 on the day of departure and 24hr00 (midnight) on the day of arrival is then included. When using an overnight ferry covered by the [illegible] enter the day of departure or the day of arrival. Travel must be within the overall period of validity of the Pass. 10. It applies for each Pass that travel cannot begin before 00h01 on the first day of validity and [illegible] [ ]ight of the last day of validity. 11. Holders of a valid Pass are entitled to transportation bonuses on several ships, buses and private railroads. This free or discounted transportation can only be arranged locally [illegible] [ ]y concerned[1] 12. Holders of a valid Pass are exempt from payment of supplements for most quality trains such as EC, IC, ICE, etc. For some

quality trains however, a surcharge is required[1)], seats available at [illegible] may be limited. 13. This Pass does not guarantee a seat on a train or passage on a ship, unless a reservation is secured in advance. For certain trains and ships reservation is compulsory. Please inquire before [illegible] in Europe at a railway station or shipping company office (the Pass must be shown when securing reservations). **14. Fees for seat reservations, sleeping accommodation, meals and other extra services [illegible] [ ]re not included and must be paid for separately. Port taxes, baggage shipment etc. are also additional.** 15. If the traveler cannot present a valid passport with his/her Pass, the control staff is authorized to [illegible] [ ]re ticket and a fine, charged in conformity with the regulations of the railway concerned. Use of a Pass on which the indications have been altered or tampered with, which is forged, or used by anyone other [illegible] or beyond its validity period, authorizes control staff to confiscate the Pass and to demand the payment of the full fare, plus a fine of € 100 maximum[2)]. Traveling with a Pass which has not been validated [illegible] a Pass on which the date has not been entered, according to the instructions in point 9, authorizes control staff to levy a fine of € 50 maximum[2)] and ask for payment of a full fare ticket. If the calendar date [illegible] not be corrected and another box must be used, otherwise the control staff is authorized to confiscate the Pass and to demand the payment of the full fare, plus a fine of € 100 maximum[2)]. **16. If this pass [illegible] [ ]urchase either before the first day of validity**

or endorsed "UNUSED" by a railway official in Europe, before the first day of validity, the entire cost is refunded, less a 15% cancellation fee. In all other [illegible] [ ]y used Pass etc.) there is no refund, nor replacement. Applications for refund must be submitted within a period of one year after the date of issue. 17. Eurail and its participating railways cannot be held [illegible] to strikes, delays or missed connections, theft or loss of non-registered baggage. 18. The issuing office is merely the intermediary of the carriers in Europe and assumes no liability resulting from the transport [illegible] [ ]rail National Pass, transportation covered is subject to the "Uniform Rules concerning the contract for International Carriage of Passengers and Luggage by Rail" (CIV). In case of a Eurail National Pass, the [illegible] [ ]ry concerned apply. In respect of carriage by sea, the legal provisions of the individual particular sea carrier apply.

2) or equivalent in local currency

[illegible] [ ]ass tariff does not include the insurance for baggage, which is under your surveillance at the stations and in the trains at all times. We advise you to insure against the loss and theft of your personal

[illegible] [ ]n the English and other translated texts shall prevail.

FUCHS DECLARATION

EXHIBIT 3

OBB Personenverkehr AG 118711 300896 1
KUNDEN-BELEG INNSBRUCK, HBF
25.04.07/09.31

VISA
4185 8680 1098 1264 (2) 03/08

501791 06082672

Genehmigungsnummer: 01645B
Belegnummer: 000709

BEZAHLT EUR 000030,90

139573681
139573681

JUAN C. BASOMBRIO (CA# 150703)
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Email: bulthuis.zach@dorsey.com

Attorneys for Defendant
OBB PERSONENVERKEHR AG

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CAROL P. SACHS, Plaintiff, v. REPUBLIC OF AUSTRIA, OBB HOLDING GROUP, OBB PERSONENVERKEHR AG, Defendants.	NO.: C08-01840 VRW **DECLARATION OF DR. GEORG KODEK IN SUPPORT OF DEFENDANT OBB PERSONENVERKEHR AG'S MOTION TO DISMISS THE COMPLAINT AS AMENDED** (Filed Jun. 21, 2010)

HEARING:

DATE:
SEPTEMBER 2, 2010
TIME: 10:00 A.M.
PLACE:
COURTROOM 6
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE AVE., SAN FRANCISCO, CA 94102

DECLARATION OF DR. GEORG KODEK

I, Georg Kodek, declare that if called as a witness in this action, I could and would competently testify to the following based on my personal knowledge:

Qualifications

1. Based upon my extensive experience with Austrian law and procedure, as described in my *curriculum vitae* (a true and correct copy of which is attached hereto as Exhibit A), I am competent to testify authoritatively and reliably on various details of the Austrian legal system, including Austrian substantive and procedural law, as set forth below.

2. I graduated from the University of Vienna Law School in March of 1986. I continued my studies and, in March of 1987, was awarded a doctorate in

law. From 1986 to 1987, I clerked for several Austrian courts. In 1988, I was trained at the district attorney's office in Eisenstadt, Austria. From August 1988 to May 1989, I attended a graduate program at Northwestern University School of Law in Chicago, Illinois, and received a Master of Laws (LL.M.) degree. Thereafter, I worked as a summer intern in the Kings County District Attorney's Office, Brooklyn, New York. When I returned to Austria, I again clerked for several trial and appellate courts.

3. Between 1991 and 2005, I have served as a judge of the Superior Court ("*Landesgericht*") in Eisenstadt, Austria, as a district court judge for the District of Central Vienna, and as a judge of the Court of Appeals in Vienna. I was appointed to the Austrian Supreme Court effective January 1, 2006, and currently have that post.

4. Since 1995, I also have taught civil procedure to future judges and law clerks at the Judiciary Education Center in Schwechat, Austria. I have published several books and articles in the field of Austrian civil law and procedure. I have coauthored a number of treatises on civil procedure, including a commentary on the Enforcement of Judgments (Burgstaller and Deixier-Huebner, Exekutionsordnung (4 vols, LexisNexis, Vienna 2002, updated 2006).). Currently, I am co-authoring a five-volume treatise on Austrian civil procedure and a nine volume treatise on bankruptcy law with noted law professors and judges. I am co-editor of the most widely used annotated edition of the Austrian Code of Civil Procedure (Kodek/Klauser,

Zivilprozessgesetze, 16th ed., 2006). Recently I was chosen as successor editor of Austria's largest commentary on Austrian civil law after the retirement of Professor Michael Schwimann, who edited three prior editions in the past 20 years. The first volume of this eight volume edition will be published in 2011.

5. After teaching at the University of Vienna School of Law for several years, I was appointed professor of civil and commercial law at the Vienna University of Economics (Wirtschaftsuniversitaet Wien), effective October 2008. It was agreed between the Chief Judge of the Supreme Court and the President of the University that I would hold this chair on a part-time basis in addition to my duties as a judge.

6. Since 1991, I also have served as an expert for the Council of Europe. Originally, my task was to teach lawyers from Eastern Europe about procedural law and due process guarantees. In connection with that appointment, I have presented lectures in Strasbourg, Brussels, Moscow, Vilnius and other cities. In the fall of 1997, I was appointed to be one of three Council of Europe experts designated to review the new Code of Civil Procedure of the Federation of Bosnia and Herzegovina. In 2000, I was appointed to review the new Ukrainian Code of Civil Procedure. In the summer 2003 and September 2004, I reviewed the new Codes of Civil Procedure for Serbia and Montenegro. Most recently, in 2005, I worked as an expert for the Council of Europe reviewing a draft of the Code of Non-Contentious Proceedings of Montenegro.

7. From an American point of view it may be considered unusual for a sitting judge to testify as a legal expert, but this is not the case in Austria. On the contrary, a leading authority on Austrian conflicts of laws, Professor Schwimann, has stated that when foreign law has to be applied, courts should rely on testimony of foreign judges. In 1997, the Austrian attorney general, Dr. Nikolaus Michalek, stated that expert opinions rendered by judges (in cases not assigned to them) are desirable. Nonetheless, if Carols Sachs were to file suit in Austria, and that case was appealed to the Austrian Supreme Court, of course I would recouse myself and not participate in that case.

System of Government in Austria

8. Austria is a federal republic, and a sovereign nation. It consists of nine states ("Bundeslander"). The capital Vienna is also a state. The current Constitution of 1920 (which has been amended several times) provides for separation of powers among the executive, legislative and judicial branches of government.

9. At the federal level, the legislative power is exercised by Parliament which consists of two houses, the National Assembly, and the Federal Council which has veto powers. The executive branch is headed by the Federal Chancellor and a Cabinet of Ministers and State Secretaries. There is a Federal President, who forms the government on the basis of

parliamentary elections, appoints federal officials, is commander in chief of the Austrian Army, and represents Austria vis-à-vis foreign countries. At the state level, there is a legislature and government headed by a governor ("Landeshauptmann").

10. The court system is independent and separate from the executive and legislative branches (art. 89 of the Austrian Constitution). Judges are appointed until a mandatory retiring age of 65. Civil and criminal law and procedure are promulgated at the federal level. The powers of the states are mostly limited to administrative law, such as building and zoning laws. There are only federal courts in Austria. At the state Level, there are administrative agencies, which are subject to review by the federal courts in Vienna. Austria was the first country in Europe to introduce judicial review in 1920.

Legal System in Austria

11. Austria is a civil law country. Thus, its law is based on the traditions of Roman Law. Substantive civil law was first codified in Austria in 1811 (Civil Code, "Allgemeines Bürgerliches Gesetzbuch" – "ABGB"). However, many special areas of civil law are governed by separate statutes such as commercial law (e.g. Business Code) or some aspects of the law of damages (e.g. the Railroad and Motor Vehicles Liability Act – "Eisenbahn- und Kraftfahrzeughaftpflichtgesetz"-EKHG).

12. The general provisions on damages are found in the Austrian Civil Code (sec. 1293 et seq.), Under the Civil Code, liability generally requires a showing of fault. Fault may be established through a showing of intentional wrongdoing or negligence. These basic tenets are supplemented by several statutes providing for stricter liability in certain areas, such as in connection with the operation or use of "dangerous things." A relevant example is the Railroad and Motor Vehicles Liability Act. Under this Act, the "holder" (i.e. owner or operator) of a train or vehicle may be liable for damages caused by the train or vehicle, except where the damages were caused by "events beyond his control" (section 9 of EKHG), such as accidents caused by the victim or a third party. The owner or operator also may be held liable for "exceptional dangers of operation" ("außergewöhnliche Betriebsgefahr"), which term covers situations such as when a car becomes unsteerable because of skidding, because of an emergency stop, etc.

Austrian Procedure and Civil Trials

13. It is a basic principle of Austrian law and procedure that every person is entitled to due process and full equality under the law, and to a fair and just hearing by an independent and impartial tribunal, with rights to appeal.

14. Austria has a four-tier court system. Depending on the amount in controversy or nature of

the claim, a case starts at district court (limited jurisdiction) or superior court ("Landesgericht"). Appeals of decisions of the district courts are to the appellate division of the superior court, appeals of the decisions of superior courts are heard by the court of appeals. The court of last resort is the Supreme Court in Vienna.

15. If Carol Sachs were to file suit in Austria, the case would be adjudicated by a federal judge. If the amount in controversy exceeds EUR. 100,000, either party may ask for a trial by a panel of three judges. There are no juries in Austrian civil cases.

16. The case starts with a written complaint which sets forth the relevant facts and demands a specific amount of damages. The defendant then files an answer, which is followed by additional exchanges of written pleadings setting forth the facts and law. The court will schedule a preliminary hearing during which the parties' legal arguments and evidence are discussed. Thereafter, the "trial phase" begins. In Austria a "trial" normally consists of several hearings which may be separated by intervals of time.

17. Under Austrian law, there is no "discovery period" in the American sense. Nonetheless, Austrian law does provide for a wide range of ways to obtain evidence.

18. For example, there are several ways to obtain documentary evidence (sections 303 *et seq.* Austrian Code of Civil Procedure). Under these provisions, a party must produce certain categories of

documents, such as documents referred to in his pleadings. In addition, an opposing party can request production of documents, subject to withholding based on the opposing party's objections on grounds of privilege, etc. The court will decide whether to sustain these objections or order production.

19. During the trial phase, the fact witnesses are examined, first by the judge and then by the parties. There is no distinction between a case-in-chief and rebuttal, since the order in which witnesses are examined is in the discretion of the judge.

20. The Court also may appoint expert witnesses with input from the parties. Expert witnesses conduct their own objective review of the questions presented by the Court, and render independent opinions. The parties may challenge the experts and comment on their opinions. Parties also may hire their own private experts to assist them in preparation of their case, and in responding to court appointed experts. Judges have the discretion to allow court appointed experts to discuss the case with the private experts. However, the private experts generally acts as consultants to the parties, and do not render an opinion in the case.

21. The court also has the discretion to inspect ("Lokalaugenschein") the scene of an accident, which may be relevant in cases such as this.

22. After trial, the judge will commonly render judgment in writing, although he may render judgment orally in open court in less complex matters.

The written judgment sets forth the findings of fact and legal conclusions of the Court. In Austria, judgments are often very detailed and contain a thorough discussion and analysis of the parties' claims, the evidence, the applicable law, and the conclusions of the Court.

23. As noted above, there is a right to appeal the trial court's judgment to the Court of Appeals. While in theory both the findings of fact and questions of law are subject to review, in practice appellate courts pay deference to trial courts with respect to findings of fact. Thus, an appeal is more likely to focus on procedural issues and questions of substantive law. A further appeal can be taken to the Austrian Supreme Court in cases where an important question of substantive or procedural law is involved, or where there are no precedents or conflicting precedents.

Independent Judgment of the Judiciary

24. As noted above, under separation of powers principles, and as a matter of practice, Austrian judges are independent of the legislative and executive branches of government, and hold appointments to retirement age. Both the original appointment and any elevation to a higher court, while made by the Attorney General or President of the Republic of Austria, are based on recommendations by special independent judicial panels which propose candidates on the basis of experience and merit.

Suits Against State-Owned Entities like OBB Personenverkehr AG

25. Austrian judges treat state-owned enterprises just like any other businesses and would in no way give them any preferential treatment.

26. There are no procedural or substantive restrictions on suits against state-owned enterprises in Austria. A suit against a state-owned enterprise in no way differs from a suit against a private corporation or individual, except that the defendant usually is represented by government attorneys of the "Finanzprokuratur."

27. Within Austria, there is no governmental immunity from suit. Since the 18th Century, Austrian judges have held government entities liable like ordinary citizens even for acts committed in the exercise of governmental authority. Given this tradition, any concerns that, the ultimate ownership of a common carrier by the Republic of Austria may prejudice a private plaintiff's case, would be clearly unfounded.

28. Indeed, in several cases Austrian courts have held defendant OBB (as well as other government-owned defendants) liable and have awarded significant damages. For example, in 2000 the Austrian Supreme Court affirmed a judgment finding OBB liable in a case brought by a child, a British citizen, who had been injured while climbing on top of

a boxcar and touched the electrical overhead line.[1] After the judgment the case was settled as to quantum with OBB agreeing to pay damages up to the maximum then authorized by the Railroad and Vehicles Liability Act. In the same year, the Austrian Supreme Court affirmed a judgment against OBB in a case where plaintiff was injured by a fellow passenger while travelling in a sleeping car.[2] In 2002, the Austrian Supreme Court found OBB 50 percent liable under Austria's system of contributory negligence in a case where the plaintiff, a minor, was seized by a train while crossing the rails.[3] All these cases were settled with respect to the issues not finally determined by the Austrian Supreme Court. Most recently, in 2005 the Austrian Supreme Court affirmed a judgment holding OBB liable when a passenger fell out of a train door while the train was in motion.[4] I am informed that in another case involving a German plaintiff who collided with a bus operated by OBB a settlement was reached which provided for payment of damages up to the cap provided by the Railroad and Vehicles Liability Act.

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[1] Judgment of the Austrian Supreme Court of June 8, 2000, 2 Ob 150/00y.

[2] Judgment of the Austrian Supreme Court of December 21, 2000, 2 Ob 269/00y.

[3] Judgment of the Austrian Supreme Court of January 28, 2002, 2 Ob 310/01d.

[4] Judgment of the Austrian Supreme Court of September 22, 2005, 2 Ob 260/04f.

Carol Sachs' Status as a Foreigner Does Not Affect Her Legal Rights.

29. If Carol Sachs (who I understand to be an American citizen or resident) filed suit in Austria against the defendants named in this case, she would be guaranteed a fair trial. Pursuant to the Treaty of Friendship, Commerce and Consular Rights between Austria and the United States of July 17, 1931, which remains in force, in civil actions for injury or death, Americans enjoy the same rights in Austrian proceedings as Austrian citizens (id. at article II). Thus, Carol Sachs would enjoy the same rights in Austrian courts as Austrians. This treaty also dictates that she will not be required to pay a *cautio actoris* (a bond for the opponent's attorney's fees should she not prevail, otherwise required of foreign plaintiffs by section 57 of the Code of Civil Procedure).

Access to Austrian Counsel

30. Austria has a highly qualified bar. There are several thousand practicing attorneys most of whom speak English.

31. Under Austrian law, the winning party is entitled to attorney's fees (section 41 of the Code of Civil Procedure). Although there are no contingency fees in Austria (section 879, par. 2(2) of the Civil Code), many lawyers routinely represent clients in personal injury cases without asking for a retainer. Thus, a plaintiff generally does not have to pay her lawyer until the end of the case. If a plaintiff prevails,

her attorney's fees are paid by the defendants. If she looses her case, often fee arrangements provide for a reduction of attorney's fees. Typically, a settlement of a civil action will take into account a plaintiff's attorney's fees. Attorneys are not allowed to charge contingency fees. However, litigation finance is legal and available.

32. Under the litigation finance system, attorneys fees and costs of litigation are financed by a litigation finance company on a contingency-fee basis. There are several private companies in Austria which offer this service for high value claims (above EUR 40,000 or 50,000). Since the prohibition of contingency fees applies only to lawyers and other legal professionals, the Civil Code does not prohibit litigation finance on a contingency fee basis by these third parties[5] Thus, for a contingency fee, these companies pay attorneys and expert fees, and indemnify their client if she looses and has to pay fees/costs to his opponent. This service offers one major advantage over the traditional legal aid proceeding to a plaintiff who cannot finance a lawsuit – it takes away the risk of having to pay fees/costs to a defendant if the plaintiff is unsuccessful.

33. Under Austrian law, legal aid also is available in civil cases, and is granted by the court on

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[5] See Wagner, Rechtsprobleme der Fremdfinanzierung von Prozessen, JB1 2001, 416 [Legal Problems of Litigation Finance by Third Parties].

application. It may include a full or partial waiver of court fees, expert fees and appointment of an attorney (sections 63 *et seq.* of the Code of Civil Procedure).

Conflicts of Law: Austrian Law Would Apply

34. Under Austrian choice of law principles, Carol Sachs' claims would be decided according to Austrian substantive law (section 48 of the Austrian Conflict of Laws Act – "Bundesgesetz über das Internationale Privatrecht", IPRG; and, Danzl in Danzl, Gutierrez-Lobos, Müller, Schmerzengeld, 7th ed. 193; Austrian Supreme Court SZ 44/186 [1971] and ZVR 1985/165). In addition to the *locus* of the tort being located in Austria, Austria also has a significant state interest in having this matter determined under Austrian law. As stated previously, there is no question that under conflict of laws analysis this case will ultimately have to be decided according to Austrian substantive law. Austrian courts would be better suited to apply, interpret and develop, if needed, Austrian law, particularly in light of the long history of Austrian law, bulk of case law, and wealth of Austrian literature on the subject.

Jurisdiction

35. Pursuant to sections 2 and 5 of EC Regulation on Jurisdiction ("Brussels Regulation"), the Courts of Austria have jurisdiction over all of the defendants named by Carol Sachs in this action.

36. Carol Sachs could file this case in Vienna pursuant to sections 74 and 75 of the Austrian Judicature Act (Jurisdiktionsnorm – JN). Alternatively, since this incident occurred in Innsbruck, Austria, the plaintiff could file in Innsbruck. Both Article 5 nr. 3 of the Brussels Convention on Jurisdiction and Section 92a of the Austrian Judicature Act provide for jurisdiction where the negligent act was allegedly committed.[6]

37. As to the Republic of Austria, subject matter jurisdiction would lie with the Superior Court of Vienna (Landesgericht für Zivilrechtssachen Wien), and with the Vienna Commercial Court (Handelsgericht Wien) for the other defendants. If suit were filed in Innsbruck, the Innsbruck Superior Court (Landesgericht Innsbruck) would have jurisdiction over all defendants since in Innsbruck there is no separate commercial court.

38. An appeal from a judgment of the Vienna Commercial or Superior Court would be to the Court of Appeals of Vienna (Oberlandesgericht Wien). An appeal from a judgment of the Innsbruck Superior Court would be decided by the Court of Appeals in

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[6] For the sake of completeness, it should be mentioned that Article 16 of the Brussels regulations, under which a customer can sue in the courts of his place of residence, applies only to EU-residents (Article 16 para. 1). Also, this provisions does not apply to transportation contracts, regardless of where the parties are domiciled (Article 15 para 3.).

Innsbruck. Further appeal would be to the Austrian Supreme Court in Vienna.

No Exhaustion of Administrative Remedies

39. Under Austrian law, this is a civil case (as opposed to an "administrative" one) and thus can only be decided by the courts. There is no mandatory administrative procedure which plaintiff has to resort to before she can initiate a lawsuit in the courts.

Potential Legal Theories and Remedies Available to Carol Sachs Under Austrian Law

40. Based on the allegations in her complaint, and for illustrative purposes (without any admission or concession), Carol Sachs could proceed in Austria both under a negligence theory under section 1325 of the ABGB (Austrian Civil Code) and/or a strict liability theory under the Trains and Motor Vehicles Liability Act. These theories are not mutually exclusive. In fact, suits based on traffic accidents are routinely based on both causes of action. The concept of implied warranty is familiar to Austrian law, but would not offer additional remedies and thus would not be used in a case like this.

41. Under Austrian law, the amount of damages is a question of law. On the basis of the trial court's findings of fact, the amount of damages awarded is subject to review by the court of appeals and, in appropriate cases, the Supreme Court.

42. Under the Civil Code, tort claims generally require proof of negligence. The plaintiff has the burden of proof on elements of her claim. However, there is an important exception in cases where contractual duties of care were breached. Section 1298 Civil Code provides for a partial reversal of the burden of proof in that a plaintiff only has to show only an objective breach of a contractual duty of care. Upon such a showing, it is up to defendant to prove that nonetheless he did not act negligently.

43. While Austrian law recognizes implied warranties, this case probably in practice would be based on an allegation of a breach of duties of care. While such duties with respect to a person's life or health exist regardless of a contract, the burden of proof on a plaintiff is easier to meet. It is not necessary that the duty of care was expressly assumed in a contract; the duty of care is implied. Here, the implied duty of care would include a duty to provide safe platforms and trains, as well as safe boarding procedures.

44. As to the amount of damages, the most important provision is section 1325 of the Austrian Civil Code. This section reads as follows:

> "Anyone who inflicts bodily injury to another, has to pay the costs of treatment of the injured as well as the loss of earnings, or, if the injured becomes unable to work, also the future loss of earnings, and, on request, also has to pay adequate damages, according to

the circumstances as found by the court, for pain and suffering."

45. Costs of treatment are all expenses which were incurred because of the injury and to cure or mitigate the consequences of the injury. The costs of treatment include costs for medical supplies and prosthetics, visits of close relatives, assistance provided by relatives and nurses, and increased needs because of the accident, such as the procurement of a specially equipped car or apartment for handicapped people, etc.

46. The loss of earnings can be calculated on an actual basis (i.e. the difference between the previous income and the future income) or *in abstracto* (i.e. based on the objective reduction or loss of the ability to earn money). Loss of earnings is calculated so that the victim is in the same financial situation (after taxes) as if she had been able to continue working in her occupation. A special case of loss of earnings is the so-called abstract pension. Such a remedy provides compensation and security to the victim. Its purpose is to provide compensation for the victim because she has to take greater efforts physically and mentally to avoid an actual loss of earnings. It is intended to enable the victim to save money in case she later loses her job because of the injury. Thus, the concept of abstract pension is intended to provide security for the victim because she is likely to face added difficulties in finding a job than other applicants without the injury.

47. Damages for pain and suffering are compensation for suffering the victim undergoes because of the injury. Physical and mental suffering are taken into account. The duration and intensity of the pain, severity of the injury and impairment of health, as well as impact on the victim's life are taken into account. Neither the social position nor economic situation of the victim are to be taken into account.

48. In addition, a plaintiff may demand compensation for "mutilation" ("Verunstaltungsentschädigung"). Under this concept, a plaintiff may be entitled to additional compensation for impairment to the enjoyment of her life (e.g., current or future loss of consortium) because of the injuries sustained.

49. A plaintiff also could assert strict liability under the Railroad and Vehicle Liability Act ("Eisenbahn- und Kraftfahrzeughaftpflichtgesetz" – EKHG). As discussed above, under this Act, the owner or operator of a train may be liable for damages, except where the damages were caused by events beyond the owner or operator's control, such as accidents caused by the victim. The owner or operator also may be held liable for exceptional dangers of the operation. While the Act limits liability to the "operation" of the train or vehicle, this term has been interpreted broadly by Austrian courts to include boarding, loading etc[7] As to categories of damages

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[7] Austrian Supreme Court judgments of February 5, 1991, 2 Ob 64/91 (entering and exiting a car); of March 16, 2006, 2 Ob

(Continued on following page)

recoverable, there is no difference between the Act and Civil Code: damages for expenses of treatment, loss of earnings, increased needs, pain and suffering, injuries and "mutilation" are recoverable. Courts will not distinguish between damages awarded under the Civil Code or Railroad and Vehicle Liability Act – the significance is the different burdens and elements of proof.

Duration of Case

50. Austrian courts resolve most civil cases generally in about 1 and 1/2 years. It would be extraordinary for a case to take three years or longer. Recent statistics of the Austrian Department of Justice for the year 2005 provides detailed information[8]. In 2005[9], the average duration of civil proceedings in superior courts[10] was 15.1 months and the median 10 months. In 2006, these numbers were

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9/06x (skiers entering a cable car); of January 1, 2007, 2 Ob 265/06v (boarding a subway).

[8] Bundesministerium für Justiz, Verfahrensdauerstatistik der streitigen gerichtlichen Erledigungen, Berichtszeitraum 2005.

[9] Bundesministerium für Justiz, Verfahrensdauerstatistik der streitigen gerichtlichen Erledigungen, Berichtszeitraum 2006.

[10] These cases are identified by the letters "Cg" (the prefix to the docket number in such cases) in the above statistics. Thus, only the typically more difficult cases which are brought before the superior courts ("Landesgerichte") are included in this figure.

slightly higher the average duration of proceedings in superior court cases was 16.8 months and the median was 11.5 months[11]. In 2007 the figures were slightly lower, the average duration being 16.3 months and median 11.3 months[12] The numbers for both Vienna and Innsbruck courts are roughly in line with the national figures, the average duration in Vienna being 17.2 months and median 11.8 months in 2007. For Innsbruck, the respective figures were 14.4 months and 10.4 months in 2007.

51. An appeal to the Court of Appeals (in Vienna or Innsbruck) would likely be decided within 3 to 9 months. In 2007, the average duration of superior court cases, where an appeal was taken, was 25.2 months in Vienna and 20.3 months in Innsbruck. In Innsbruck, the median duration was 19 months in Vienna and 16.3 months. These figures include the proceedings before the trial court and the appellate court together.

52. If the case were to reach the Supreme Court, it would take an additional four months to one and a half years, although the time frame is most likely to be within six to twelve months.

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[11] Bundesministerium für Justiz, Verfahrensdauerstatistik der streitigen gerichtlichen Erledigungen, Berichtszeitraum 2006.

[12] Bundesministerium für Justiz, Verfahrensdauerstatistik der streitigen gerichtlichen Erledigungen, Berichtszeitraum 2007, pages 2 and 12.

53. In this regard, it should be noted that the worst train accident in Austrian history, the so-called "Kaprun ski train fire case," took less than two years to adjudicate, although there were 338 plaintiffs represented by 50 lawyers, more than 100 witnesses, and a court file of more than 50,000 pages (without exhibits).

Foreign Sovereign Immunity Principles in Austria

54. Austrian courts have adopted a restrictive theory of foreign sovereign immunity, consistent with international law. Immunity is recognized for state actions. In 1976, Austria ratified the 1972 European Convention on State Immunity. Also, in January 2005, Austria signed the UN Convention on Jurisdictional Immunities of States and Their Property. Austria was one of the first countries to sign that Convention. In early, 2006 the Convention was ratified by both Houses of the Austrian Parliament.

OBB Personenverkehr AG

55. Until 1992, the Austrian Federal Railways were directly owned and operated by the Republic of Austria. In 1992, the Federal Railways Act (BGB1 825) created a separate state-owned stock corporation structure for these purposes.

56. The current structure is: The Republic of Austria owns 100% (section 2 par. 1 Bundesbahnstrukturgesetz 2003) of the shares of an Austrian-based stock holding

corporation: Österreichische Bundesbahnen-Holding Aktiengesellschaft, or ÖBB-Personenverkehr AG. This holding corporation was created pursuant to the Austrian Federal Railway Structure Act of 2003 (BGB1 I 2003/138, "Bundesbahnstrukturgesetz 2003"). Effective December 31, 2004, the operation of all Austrian railway systems was transferred to another Austrian state-owned corporation, the ÖBB-Personenverkehr AG. 100% of the shares of this corporation (ÖBB-Personenverkehr AG) are owned by ÖBB Holding AG (section 8 Bundesbahnstrukturgesetz 2003).

57. In a recent decision, the Austrian Supreme Court addressed the position of the OBB under Austrian law (Austrian Supreme Court judgment of March 12, 2008, 7 Ob 267/07a). It construed a statute which creates an exception from mandatory vehicle liability insurance for "vehicles of common carriers exclusively owned by the Republic of Austria." The case involved buses of the Postal Service. OBB Holding Company owned 100 percent of OBB which owned 99.93 percent of the shares of the Postal Bus Service Corporation. The remaining 0.07 percent of the shares were held by a fiduciary on behalf of OBB. The Court held that it was not necessary that the vehicle itself be owned by the Republic of Austria. It held that the exemption applied to all common carriers, even where there is a wholly government-owned corporation as intermediary.

58. Indeed, the railway industry is a highly regulated industry in Austria. Railroads are subject

to close government supervision and regulation. The Austrian Federal Ministry of Transport, Innovation and Technology controls OBB Holding Corporation (section 3 Bundesbahnstrukturgesetz 2003). In addition to the federal government's position as owner of OBB, there are also several statutes providing for close governmental regulation and supervision of railroads.

A U.S. Judgment is Unenforceable In Austria: There is No Treaty for Enforcement of Judgments Between Austria and the United States

59. The general rule is that American judgments are not recognized in Austria. If a U.S. court were to render a judgment in favor of Carol Sachs in the instant action, that judgment would not be enforceable in Austria[13] Likewise, if a U.S. court were to render a judgment in favor of the defendants in the instant action, the defendants could not use this judgment as a bar to a subsequent claim in Austria[14]. The same would be true for a settlement entered into

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[13] The only exception to this rule is marital maintenance awards. These are dealt with in a special statute which authorizes enforcement of foreign marital maintenance awards even in the absence of a bilateral treaty or convention.

[14] The fact that Austrian courts would not be bound by judgments of American courts was recognized by the Court of Appeals for the Second Circuit in *Kern et al. v. Siemens Corp. et al.*, 393 F.3d 120, 129 n.8 (2d Cir. 2004).

in the course of a U.S. proceeding – it would not be enforceable in Austria.[15]

60. Enforcement of judgments is governed by the Exekutionsordnung (i.e., the Enforcement of Judgments Act of 1896, as amended). Under section 79, a foreign judgment is only enforceable in Austria if there is a treaty or government regulation ensuring mutual recognition and enforcement of judgments in the country where the foreign judgment originated. There is no such treaty with the United States, nor is there a government regulation providing for enforcement and recognition of U.S. judgments.

61. In the absence of an applicable treaty or regulation, foreign judgments also are not enforceable in Austria under principles of reciprocity even if Austrian judgments are enforceable in the other country (Austrian Supreme Court SZ 49/29). Therefore, any judgment rendered in the instant case by a U.S. court would not be enforceable under any theory in Austria. This rule reflects Austria's traditional policy to settle mutual recognition and enforcement of foreign judgments issues by way of international treaties instead of judicial recognition. Austria has

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[15] Section 79 EO speaks of the enforcement of "judgments and documents"; section 80 expressly mentions settlements ("Vergleich") and "other public documents". Therefore there is no difference in this respect whether the parties enter into a settlement and whether this settlement is the basis for a judgment, or whether the foreign court renders a judgment on the merits.

built up a network of bilateral and multi-lateral treaties with neighbor countries and other nations such as England, France (to which the European Union law applies following Austria's accession to the EU in 1995) and others. However, there is no treaty on the recognition of judgments in civil cases between Austria and the United States, nor is there any Austrian regulation providing for recognition and enforcement of U.S. judgments. Austrian courts have therefore no legal basis to enforce, or give effect to, a U.S. judgment.

62. Nor can American judgments be enforced in Austria indirectly by filing an Austrian complaint in Austria based on the American judgment. The Austrian Supreme Court has repeatedly held that a foreign judgment which is not enforceable in Austria is without effect in Austria and therefore not a valid basis for raising claims in an Austrian proceeding (Austrian Supreme Court G1UNF 1383; SZ 32/59). Another Austrian decision points out that a foreign judgment which is not enforceable in Austria does not constitute a judgment debt (Austrian Supreme Court ZfRV 1975, 129). Thus, plaintiff, even if successful in the pending lawsuit, would have to file a completely new lawsuit in Austria if she wanted to have her American claims enforced in Austria. In that lawsuit, the plaintiff's claims would have to be re-examined in full with the Austrian court being bound neither by the findings of fact nor by the legal reasoning of the American court.

63. Similarly, as noted above, a judgment in the instant U.S. case in favor of the defendants would be of no value to them in Austria. A foreign judgment which is not recognized and enforceable in Austria does not prevent a plaintiff from bringing a second lawsuit in Austria (Austrian Supreme Court SZ 12/18; SZ 22/198). Therefore, even if the defendants were to obtain a judgment in their favor in the United States, it would not provide them with a defense against a second lawsuit brought in Austria by Carol Sachs. Therefore, the plaintiff would have two opportunities to sue.

Evidentiary Problems with Proceeding in the United States

64. Furthermore, if this case proceeds in the U.S., there would be no way to compel Austrian witnesses to testify abroad. Austria is not a signatory to the Hague Convention on the Taking of Evidence Abroad and there is no bilateral treaty between Austria and the United States on this subject. Austrian courts honor foreign judicial requests for judicial assistance through letters rogatory (section 38 Judicature Act – "Jurisdiktionsnorm"). However, that process has severe limitations and is burdensome. Letters rogatory are sent via diplomatic channels to the Austrian Foreign Ministry which forwards them to the Austrian Ministry of Justice. The Ministry of Justice sends them to the proper Austrian court. This mechanism, due to its complexity, inevitably brings

about lengthy delay even if the courts and other authorities act promptly.

Statutes of Limitations under Austrian Law

65. Under Austrian law – like in most other civil law countries – the statute of limitations is a substantive defence (Schwind, Internationales Privatrecht [1990] para. 440; Schwind, Handbuch des Österreichischischen Internationalen Privatrechts [1975] 283, 345). All limitations periods relevant to this case are set forth in the Civil Code, and the Rail and Vehicle Liability Act. Austrian scholars agree that, if under choice-of-law principles Austrian law applies to a certain case, then Austrian limitations law also applies (e.g. Schwind, Internationales Privatrecht [1990] Rz 440; Schwind, Handbuch des Österreichischischen Internationalen Privatrechts [1975] 283, 345).

66. The statute of limitation for personal injury in Austria is 3 years (section 1489 Austrian Civil Code, section 17 Rail and Vehicle Liability Act – "Eisenbahn- und Kraftfahrzeug-Haftpflichtgesetz", EKHG). This time period begins when a claimant learns about the damage and identity of the person inflicting the damage or otherwise responsible for it. The limitation period is tolled by settlement negotiations, by bringing suit before a competent court or by asking for an award of damages during a criminal proceeding (section 1497 Austrian Civil Code).

67. Under section 1497 of the Austrian Civil Code, the limitation period is tolled by filing a complaint. However, if the complaint is later dismissed, section 1497 may not allow tolling[16] Claims also may be time-barred if they are not filed in a competent court with some exceptions. And, if a case is filed in a foreign court, the general rule is that foreign suits, regardless of whether the foreign court has jurisdiction, only toll the period of limitations if the foreign court judgment would be recognized in Austria[17]. As discussed above, U.S. judgments are not recognized in Austria.

68. It should be pointed out, however, that under Austrian law the statute of limitations is a substantive defense and will not be considered by the court on its own motion. Rather, this defense has to be properly raised by defendant, and the decision whether or not to raise this defense is with defendant alone. In practice, this defense is not always raised. Austrian courts have also enforced agreements where

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[16] The German original of this provision reads as follows: "Wird aber die Klage durch einen rechtskräftigen Spruch für unstatthaft erklärt, so ist die Verjährung für ununterbrochen zu halten." Literally this translates as follows: "If the complaint is declared inadmissible by a final court order, the limitation period is deemed not to have been tolled."

[17] *Czernich* in *Czernich/Heiss*, EVÜ, Art 10 EVÜ Rz 30; *McGuire*, Verfahrenskoordination 246 ff mwN; *Verschraegen* in *Rummel*[2], Art 10 EVÜ Rz 18 mwN; Mader/Janisch in Schwimann, ABGB 3rd ed. § 1497 Rz 12; *Matscher*, JB1 1954, 54.

a party agreed in advance not to raise a limitation defense.

Conclusion

69. Accordingly, it is my opinion that Carol Sachs could bring her instant claims in Austria. The Austrian legal and judicial system is available and adequate to deal with her grievances. In fact, because the alleged facts that give rise to her claim occurred in Austria, this is a matter to be governed by Austrian law. Carol Sachs would be entitled to, and would receive, due process in Austrian courts, which are ideally suited to interpret and apply Austrian law. Under a *forum non conveniens* analysis, Austria is certainly the proper venue for the adjudication of this dispute, as all witnesses (except for Carol Sachs), the site of the alleged accident, and evidence are located in Austria. As discussed above, Carol Sachs also has many alternatives for access to Austrian counsel regardless of her particular economic condition. On the other hand, a judgment in the United States would not be enforceable in Austria, subjecting both sides to another round of litigation in Austrian courts. While the applicable Austrian statutes of limitation may have expired in the meantime, the statute of limitation is a substantive law defense in Austria and will only be considered by the court if raised by defendant. Defendant can also waive this defense in advance, thus opening for plaintiff the path to Austrian courts without any risks of a time bar defense being raised in the proceeding.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 17, 2010, in Vienna, Austria.

/s/ G. Kodek
DR. GEORG KODEK

EXHIBIT A

C.V. of Dr. GEORG E. KODEK

Experience and Education

Nov. 6, 1963: born in Vienna, Austria

June 1981: graduation from high school Vienna Fichtnergasse with honors

1981 to 1986: attendance of University of Vienna Law School

March 1986: graduation ("magister juris") from law school

Summer 1986: introductory course in Common Law in Cambridge, England

Sept. 1986-1987: clerkship for several Austrian courts

March 1987: graduation ("doctor juris") with honors from Vienna Law School after writing a thesis on "Rechtswidrig Erlangte Beweismittel im

Zivilprozeß" (Unlawfully Obtained Evidence in Civil Cases) a revised version of which was published

1988: training at district attorney's office in Eisenstadt, Austria

Aug.1988 to May 1989: graduate education at Northwestern University School of Law;

May 1989: graduation ("Master of Laws"-LL.M.)

Summer 1989: intern in King's County District Attorney's Office, Brooklyn, N.Y.

Fall 1989 to May 1991: clerkship for several Austrian trial and appellate courts which led to qualification to serve as a judge

1990: practice with the Vienna office of Heller, Löber, Bahn & partners, a law firm with offices in Vienna, Prague and Budapest

June 1991: appointment as district court judge at the District Court for Central Vienna (Bezirksgericht Innere Stadt Wien), hearing civil and criminal cases

1991 onward: Expert for the Council of Europe teaching lawyers from Eastern European Countries on Efficiency and Fairness of Civil Justice, Legal Aid and related topics, lectures in Strasbourg, Brussels, Moscow, Vilnius and other cities

July 1993: appointment to Superior Court ("Landesgericht") Eisenstadt, sitting primarily as a judge of the appellate division hearing appeals in civil cases against decisions of District Courts, but also

hearing major cases at trial level both civil and criminal

1993 to 1996: vice chairman of Damages and Traffic Law Section of the Austrian Judges Association

1995: appointed vice chairman of the disciplinary board of the chamber of architects and engineers

1996 onward: teaching at the Judiciary Education Center in Schwechat near Vienna, teaching future judges and clerks

Fall 1997: appointed member of a Council of Europe panel of three experts to review the new Code of Civil Procedure of the Federation of Bosnia and Herzegovina

Spring 2000: appointed member of a Council of Europe panel of three experts to review the draft of a new Ukrainian Code of Civil Procedure

Fall 2000: expert for Council of Europe to review proposed amendments to the Code of Civil Procedure for Bosnia and Herzegovina

Spring 2001: expert for Council of Europe to review of proposed new Code of Civil Procedure for Bosnia and Herzegovina

Fall 2001: award of "*venia docendi*" in the field of civil procedure by the University of Vienna

January 1, 2003: appointment to the Court of Appeals of Vienna (intermediate appellate court)

June 25, 2003: award of Walther Kastner-prize for distinguished publications in banking law for the treatise on consumer insolvency

2004: expert for Council of Europe to review the proposed Serbian Code of Civil Procedure

January 1, 2006: Appointment to the Austrian Supreme Court (*"Oberster Gerichtshof"*)

Major Publications

1987 Rechtswidrig erlangte Beweismittel im Zivilprozeß, eine Untersuchung der österreichischen, deutschen und amerikanischen Rechtslage (Unlawfully Obtained Evidence in Civil Cases, in Austrian, German and American Law), approx. 200 pp, MANZ publishers, Vienna

1988 Prozeßkostenersatz und Umsatzsteuer (Attorneys' Fees and Value Added Tax), RdW 1988, 56

1988 Das Fragerecht des Angeklagten nach Art. 6 MRK und die Verlesung von Zeugenaussagen (The Accused's Right to Ask Questions to Witnesses pursuant to Art. 6 of the European Convention on Human Rights and the Use of Records of Prior Statements), JB1 1988, 551

1995 Several contributions (on procedural law, warranty law and damages) in Praxishandbuch der österreichischen Produkthaftung (Practice Handbook of Austrian Products Liability), 2 vols, WEKA publishers, Vienna

2000 Österreichisches Mahnverfahren, ausländische Beklagte und das EuGVÜ (Austrian Injunctions to Pay, Foreign Defendants and the Brussels Convention), ZZPint 1999, 145

2001 Co-author of a three-volume commentary on the enforcement of judgments, edited by Burgstaller/Deixler-Hübner (Lexis-nexis, Vienna).

2001 Co-author of Rechberger/Kodek, Orders for Payment in the European Union, Kluwer

2002 Die Besitzstörung (Protection of Possession), 1076 pages, Manz publishers, Vienna.

2002 Handbuch Privatkonkurs (Handbook on the Bankruptcy of Private Individuals), Manz publishers, Vienna.

2003 Co-author Kurzkommentar Europäisches Gerichtsstands- und Vollstreckungsrecht (Commentary on European Regulation on Jurisdiction and Enforcement of Judgments), together with Dietmar Czernich and Stefan Tiefenthaler

2002-2004 Co-author of Volumes II and III of the Fasching Kommentar zu den Zivilprozessgesetzen, 2nd ed. (Commentary to the Civil Procedure Laws).

2005 Co-author of Kodek/Nowotny/Umfahrer, Kurzkommentar Firmenbuchgesetz (Commentary on the Austrian Company Register Act, Manz publishers, Vienna

FILED IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

(October 15, 2010)

EXHIBIT 1

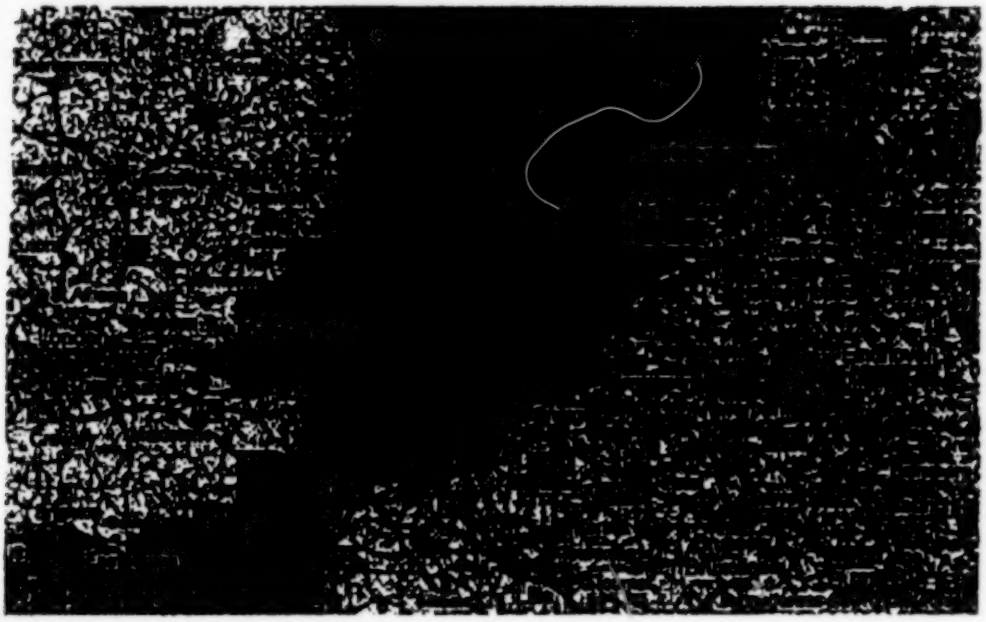
About us

In 2001, the Eurail Group was established as an organisation dedicated to the marketing and management of Eurail Pass, which had been jointly managed by a large number of train and shipping companies since 1959. In 2007 the Eurail Group took over the running of InterRail Passes, in order to give the product a more commercial focus.

Eurail and InterRail Passes are now widely regarded as the best rail passes in Europe, providing the greatest flexibility over the widest range of options.

The Eurail Group is wholly owned by the participating railways and shipping companies with key decisions being taken by the board, consisting of eight appointed member railways. In addition, the Group has many benefit partners, including hotels, transport companies, and museums, which offer their services either at a reduced rate or free of charge for rail pass holders.

Eurail Group GIE office



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Attorney for Plaintiff, Carol P. Sachs

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CAROL P. SACHS, Plaintiff, v. REPUBLIC OF AUSTRIA, OBB HOLDING GROUP, OBB PERSONENVERKEHR AG Defendants.	**NO. C-08-01840 VRW** Declaration of Geoffrey Becker in Opposition to OBB's Motion to Dismiss (Filed Oct. 15, 2010) Date: November 18, 2010 Time: 10:00 a.m. Courtroom: 6 Vaughn R. Walker, Chief Judge

I, Geoffrey Becker, declare:

a. That I am the attorney for Carol P. Sachs, the plaintiff;

b. Attached hereto as Exhibit 1 is a copy of the ticket your declarant purchased directly from OBB PERSONENVERKEHR AG via its website on August

18, 2010 along with its email confirming the purchase;

c. Attached as Exhibits 1, 2 and 3 to the points and authorities in opposition to OBB PERSONENVERKEHR AG's motion to dismiss are true copies of excerpts taken from the Eurail Group website on October 11, 2010;

d. Attached as Exhibit 4 to the points and authorities in opposition to OBB PERSONENVERKEHR AG's motion to dismiss is a true copy of an excerpt taken from Martindale Hubble regarding Austrian Law and in particular, damages under the Railroad Liability Act.

I declare under penalty of perjury under the laws of the United States of America that the statements made in this declaration are true. This declaration is signed on this 14th day of October in Lafayette, California.

/s/ Geoffrey Becker
Geoffrey Becker

EXHIBIT 1

Geoffrey Becker

From: <onlineticket@is.oebb.at>
To: <geoffrey.becker@comcast.net>
Sent: Wednesday, August 18, 2010 7:33 AM
Subject: BB Online Ticket 28115869 (Innsbruck Hauptbahnhof – > Praha hl.n.)

Sehr geehrte Kundin, sehr geehrter Kunde!

Sie haben am 18-08-10 16:30:11 ein Online Ticket bestellt

Ihr Ticket ist für Sie unter der folgenden Internet Adresse

http://ticket.oebb.at/bin/ticketview.pdf?ID=28115869&PWD=290573
bis zum Geltungsdatum abrufbar

Bestellnummer 28115869
Bestellpasswort 290573

Neue Tickets können auch unter https://ticket.oebb.at erstellt werden

Wir wünschen gute Reise,
Ihr
ÖBB Personenverkehr

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Personenverkehr

ID 28115869

FAHRAUSWEIS/BILLET/TICKET

becker geoffrey
1 Erwachsener
0 Kinder

CIV 1181

Gültig: HF 15.09.10 RF *

DATUM	ZEIT	VON/DE/FROM	-> NACH/A/TO	DATUM	ZEIT	KL CL.
15.09 *	05:00 *	Innsbruck Hauptbahnhof *****	-> Praha hl.n. -> *****	15.09 *	17.21	2 *

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CAROL P. SACHS, Plaintiff, v. REPUBLIC OF AUSTRIA, OBB HOLDING GROUP, OBB PERSONENVERKEHR AG Defendants.	**NO. C-08-01840 VRW** Declaration of Carol P. Sachs in Opposition to Motion to Dismiss (Filed Oct. 18, 2010) Date: November 18, 2010 Time: 10:00 a.m. Courtroom: 6 Vaughn R. Walker, Chief Judge

I, Carol P. Sachs, declare:

a. That I am a resident of Berkeley, California and I am the plaintiff;

b. Regarding the Eurail pass referenced in the motion to dismiss, I conducted an internet search for Eurail passes and I saw a website listing travel in Austria and Czechoslovakia;

c. I purchased the Eurail pass via the website and my Visa credit card was debited for the amount shown on Rail Experts/Rail Pass Experts confirmation;

d. In order for me to board the train in Innsbruck, I needed to present the pass to the OBB;

e. Both legs above the knee were amputated as a result of the injuries I received in this accident. Because of scar tissue on my right stump, I have not been fitted with a prosthesis and I go about my day in a wheelchair. I have diabetes and I currently take medication to control my blood sugar which is elevated by stress. Traveling to Austria in a wheelchair would not be manageable and would be very stressful. Not having immediate access to my doctor would also be very troubling.

I declare under penalty of perjury under the laws of the United States of America that the statements made in this declaration are true. This declaration is signed on this 16th day of October, 2010 in the City of Berkeley, State of California.

/s/ Carol P. Sachs
Carol P. Sachs

PETITIONER'S BRIEF

No. 13-1067

In The Supreme Court of the United States

OBB PERSONENVERKEHR AG,

Petitioner,

v.

CAROL P. SACHS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act, 28 U.S.C. §§1602 *et seq.* ("FSIA"), broadly provides sovereign immunity to foreign states and their instrumentalities, subject to limited statutory exceptions. The first clause of the commercial activity exception provides, *inter alia*, that United States courts have subject matter jurisdiction over claims that are "based upon a commercial activity carried on in the United States by the foreign state." *Id.* §1605(a)(2).

The questions presented by this Petition are:

1. Whether, for purposes of determining when an entity is an "agent" of a "foreign state" under the first clause of the commercial activity exception of the FSIA, 28 U.S.C. §1605(a)(2), the express definition of "agency" in the FSIA, the factors set forth in *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), or common law principles of agency, control.

2. Whether, under the first clause of the commercial activity exception of the FSIA, 28 U.S.C. §1605(a)(2), a tort claim for personal injuries suffered in connection with travel outside of the United States is "based upon" the allegedly tortious conduct occurring outside of the United States or the preceding sale of the ticket in the United States for the travel entirely outside the United States.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner-defendant is OBB Personenverkehr AG ("OBB"), an instrumentality of a foreign state, the Republic of Austria. Pursuant to Supreme Court Rule 29.6, OBB states that OBB's stock is wholly held by OBB Holding Group, a joint-stock company organized under Austrian law and created by the Republic of Austria pursuant to the Austrian Federal Railways Act. The sole shareholder of OBB Holding Group is the Austrian Federal Ministry of Transport, Innovation and Technology, an organ of the Republic of Austria.

Respondent-plaintiff Carol P. Sachs ("Sachs"), a California resident, brought an action against OBB, OBB Holding Group, and the Republic of Austria based on personal injuries she incurred at a train station in Innsbruck, Austria. OBB and the Republic of Austria moved to dismiss the complaint for lack of subject matter jurisdiction under the FSIA. Sachs did not oppose the Republic's motion which was granted. The District Court, over Sachs's objection, granted OBB's motion to dismiss. Sachs appealed only the dismissal of OBB. Sachs voluntarily dismissed her claims against OBB Holding Group, whom she had never served with process, in the District Court. Neither the Republic of Austria nor OBB Holding Group was a party to the appeal to the Ninth Circuit; neither is a party in this Court.

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BRIEF FOR PETITIONER

Petitioner OBB respectfully submits that the judgment of the Court of Appeals should be reversed.

OPINIONS BELOW

The District Court's opinion is unreported. App. 101. The Ninth Circuit's panel opinion is reported at 695 F.3d 1021, and is reproduced at App. 67. The order for rehearing *en banc* is reported at 705 F.3d 1112. The *en banc* opinion is reported at 737 F.3d 584, and is reproduced at App. 1. The Ninth Circuit's order staying the mandate pending this Court's final disposition is unreported. App. 100.

JURISDICTION

The Ninth Circuit filed the panel opinion on September 26, 2012. App. 67. The Ninth Circuit granted Sachs's petition for rehearing *en banc* on January 25, 2013. The *en banc* court filed its opinion on December 6, 2013. App. 1. A petition for a writ of certiorari was filed on March 5, 2014. This Court granted the petition on January 23, 2015, and has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1602 *et seq.*, and, specifically, the first clause of the commercial activity exception to foreign sovereign immunity, which provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; .

§1605(a)(2).

The key terms in the first clause of the commercial activity exception are defined in the FSIA:

> §1603. Definitions
>
> For purposes of this chapter—
>
> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having

substantial contact with the United States.

§§1603(a)-(e). These provisions, and other relevant provisions of the FSIA, are set forth in the appendices to the Petition for a Writ of Certiorari and this brief. App. 112-120 (Appendix to Petition); A-1 – A-7 (Appendix to this brief).

STATEMENT OF THE CASE

I. FOREIGN SOVEREIGN IMMUNITY UNDER THE FSIA

Petitioner OBB contends that United States courts lack subject matter jurisdiction over this action because OBB has foreign sovereign immunity under the FSIA, and the FSIA's commercial activity exception to immunity does not apply.

"The doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976." *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). Prior to the FSIA's enactment, "sovereign immunity decisions were [being] made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Republic of Argentina v. NML Capital, Ltd.*, 134 S.Ct. 2250, 2255 (2014) (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983)) (alteration in *NML Capital*).

"Congress responded to the inconsistent application of sovereign immunity by enacting the FSIA in 1976." *Samantar*, 560 U.S. at 313. Congress declared in the FSIA that "[c]laims of foreign states to immunity should henceforth be decided by courts in conformity with the principles *set forth in this [Act].*" *NML Capital*, 134 S.Ct. at 2256 (quoting §1602) (alteration in *NML Capital*).

Accordingly, the FSIA is "a *comprehensive* statute containing a 'set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.'" *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004) (quoting *Verlinden*, 461 U.S. at 488) (emphasis added); *accord NML Capital*, 134 S.Ct. at 2255.[1]

The FSIA's passage had "two well recognized and related purposes : adoption of the restrictive view of sovereign immunity and codification of international law at the time of the FSIA's enactment." *Permanent Mission of India to the United States v. City of New York*, 551 U.S. 193, 199 (2007); §1602 (Congress's "declaration of purpose" states its intent to codify the restrictive theory of sovereign immunity under international law). Under the restrictive theory,

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[1] *See also* H.R. Rep. 94-1487, 94th Cong., 2d Sess. 12 (1976) (The FSIA "is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities.").

"immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Samantar*, 560 U.S. at 312 (quoting *Verlinden*, 461 U.S. at 487).

"After the enactment of the FSIA, the Act – and *not the pre-existing common law* – indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Id.* (emphasis added); *accord NML Capital*, 134 S.Ct. at 2255.

This Court has repeatedly held that "the text and structure of the FSIA demonstrate Congress' intention that the FSIA provides *the sole basis* for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (emphasis added); *accord, e.g., Permanent Mission*, 551 U.S. at 197.

"Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993);[3] *accord Samantar*, 560 U.S. at 313-14 ("if a defendant is a 'foreign state' within the meaning of the Act, then the defendant is immune from

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[3] Under the FSIA, "personal jurisdiction, like subject-matter jurisdiction, exists only when one of the exceptions to foreign sovereign immunity in §§1605-1607 applies." *Amerada Hess Shipping*, 488 U.S. at 435 n.3; *see also* §1330.

jurisdiction unless one of the exceptions in the Act applies") (citing §§1604, 1605-1607).

The "most significant of the FSIA's exceptions" is the commercial activity exception contained in §1605(a)(2). *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992). That exception (and specifically its first clause which is at issue here and highlighted below) provides that a foreign state is not immune from suit in any case:

> *in which the action is based upon a commercial activity carried on in the United States by the foreign state*; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

§1605(a)(2) (emphasis added).

The commercial activity exception is carefully tailored. Each of the five terms defined in the FSIA's "Definitions" section is found in the twenty-word first clause of that exception. *Compare* §§1603(a)-(e), *with* §1605(a)(2) (first clause); *see also supra* pp. 2-4 & A-2-A-3 (reciting FSIA's definitions of "foreign state," "agency or instrumentality of a foreign state," "United States," "commercial activity," and "commercial activity carried on in the United States by a foreign state").

As interpreted by this Court, "[f]or there to be jurisdiction" under the first clause of the commercial activity exception, the plaintiff's "action must be 'based upon' some 'commercial activity' by [the foreign state] that had 'substantial contact' with the United States within the meaning of the Act." *Nelson*, 507 U.S. at 356.

II. OBB, WHICH OPERATES THE STATE-OWNED RAILWAY, IS A "FOREIGN STATE" UNDER THE FSIA ENTITLED TO INVOKE FOREIGN SOVEREIGN IMMUNITY

As an undisputed "organ" and "agency or instrumentality" of the Republic of Austria, and thus a "foreign state," OBB properly invoked foreign sovereign immunity under the FSIA. *See* App. 13; *see also* App. 104 n.1 ("Plaintiff does not contest that OBB is in fact an organ of the Republic of Austria.").

OBB operates passenger rail service solely within Austria. Joint Appendix ("JA") at 26 ¶5. It is, by statute, a public railway company, with its responsibilities and functions dictated by the Austrian Federal Railways Act.[3] *Id.* OBB does not do business in the

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[3] OBB has no private shareholders, but is wholly owned by OBB Holding AG ("OBB Holding"), a joint-stock company organized under Austrian law and created by the Republic of Austria under §2 of the Austrian Federal Railways Act BBG. The sole shareholder of OBB Holding is the Austrian Federal Ministry of Transport, Innovation and Technology. JA at 25-26 ¶¶2-3. As discussed above, *supra* ii, OBB Holding and the

(Continued on following page)

United States. OBB does not have offices, employees or bank accounts in the United States, nor does it have a license to do business in the United States. JA at 33 ¶23. OBB is not regulated in the United States and is not subject to United States law. *Id.*[4]

III. SACHS WAS ALLEGEDLY INJURED WHEN BOARDING A MOVING OBB TRAIN IN AUSTRIA.

On April 27, 2007, at a train station in Innsbruck, Austria, Sachs, a California resident, attempted to board a moving train operated by OBB. App. 101 (citing Dist. Ct. Docket, Doc. 43 at 10, 58 at 1-2); *see* JA at 84-85 ¶¶a, d-e, 32 ¶¶21-22. Sachs allegedly fell into the tracks and suffered severe injuries resulting in the amputation of her legs. App. 101; *see* JA at 85 ¶e.

Sachs purchased her couchette bed reservation for the train she tried to board two days earlier, from

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Republic of Austria were named defendants, but were dismissed and are no longer parties to this action.

[4] Sachs pleaded that "[a]t all times relevant, OBB PERSONENVERKEHR AG advertised via the world wide web that American citizens can purchase their tickets directly from the OBB PERSONENVERKEHR AG website," JA at 14 ¶2, and her attorney offered to the District Court a train ticket (not a Eurail Pass) he purchased online from OBB in 2010, three years after Sachs's accident, JA at 79-83. But there was no allegation that these advertisements were viewed by Sachs prior to this suit being filed, and Sachs did not purchase her Eurail Pass from the OBB website. *See* JA at 84-85 ¶¶b-c.

OBB, while she was in Innsbruck. JA at 32 ¶21, 40. This couchette bed reservation was an upgrade that guaranteed her a couchette bed on the train. *Id.* Sachs had previously purchased a Eurail Pass that provided her with four days of travel between Austria and the Czech Republic within a two month window of time. JA at 30-31 ¶18, 31-32 ¶20, 34-35. The Eurail Pass alone would have only allowed Sachs to board the train and use an unoccupied regular seat. JA at 32 ¶21.

Sachs purchased the Eurail Pass from a third-party website, *not* from OBB's website. JA at 84-85 ¶¶b-c. Sachs's receipt shows that she purchased the Eurail Pass from The Rail Pass Experts ("Rail Pass Experts" or "RPE"), a company located in Massachusetts. JA at 34. Sachs's Eurail Pass did not include any reference to RPE, but only contained the Order ID number "RC 122351" listed on Sachs's receipt. JA at 34-35.

IV. RPE AND THE EURAIL GROUP

It is undisputed that the RPE is not an authorized agent of OBB, nor does it have any legal relationship with OBB. JA at 30-31 ¶18. Indeed, there is no evidence that "OBB was even aware of the Rail Pass Experts's existence" prior to this suit. App. 108.

For purposes of this suit, OBB recognized that "The Rail Pass Experts may be, presumably, a subagent of a general sales agent accredited by The Eurail Group and, therefore, able to sell Eurail passes (likely

at higher rates than those available from Eurail directly)." JA at 31 ¶18. The Eurail Group markets and sells rail passes, which it does in part through accredited general sales agents. JA at 31 ¶¶18-19.

The Eurail Group, for its part, is a separate legal entity, organized under the laws of Luxemburg, and headquartered there as well, with its own management and employees. JA at 31 ¶19. OBB is a member of the Eurail Group, together with approximately 30 other similar railway transportation providers in other European nations, all of which are members of an assembly which is convened for certain reasons. *Id.*; *see* App. 69, 108.

Importantly, "there are no factual allegations or evidence that OBB exerted 'day-to-day' control over either Eurail Group or Rail Pass Experts." App. 108.

V. THE PROCEEDINGS BELOW

Had Sachs sued OBB in Austria, she would have been entitled to due process in Austrian courts, under Austrian law, and with access to Austrian counsel regardless of her economic condition. JA at 53-63 ¶¶29-53, 71 ¶69.

Instead, she filed suit in the Northern District of California in April 2008. *See* JA at 1, 13. Sachs's Complaint alleged five causes of action against OBB, OBB Holding, and the Republic of Austria, each of which pertained to the train accident in Austria:

(1) Negligence for purportedly moving the train, providing an unsafe place to board, failure to warn of the gap in the boarding platform, failure to provide supervision at the Innsbruck station, and failure to stop the train and lock the railcar doors.

(2) Strict Liability – Design Defect for defects in the railcars and boarding platform.

(3) Strict Liability – Design Defect – Failure to Warn for the lack of warnings on the railcars and boarding platform.

(4) Breach of Implied Warranty of Merchantability for impliedly warranting that the railcars and boarding platform were reasonably safe when they were not.

(5) Breach of Implied Warranty of Fitness for impliedly warranting that the railcars and boarding platform were fit for their intended purposes when they were not.

JA at 14-18 ¶¶1-20.

OBB and the Republic of Austria moved to dismiss the Complaint under the FSIA and other grounds. *See* JA at 2 No. 43; *see also* Dist. Ct. Docket 43-48; 51-54. Sachs did not oppose the Republic of Austria's motion to dismiss, Dist. Ct. Docket 60, and voluntarily dismissed her claims against OBB Holding, Dist. Ct. Docket 79, but argued that OBB was subject to suit under the first clause of the commercial activity exception because her suit was "based

upon a commercial activity carried on in the United States by the foreign state," App. 104 & n.2. Sachs's purchase of the Eurail Pass from RPE in 2007 was "the only relevant commercial activity within the United States" she claimed. App. 104-05. Sachs argued that "because the purchase of the pass occurred in the United States, and her injury claim is based upon that commercial activity, the commercial activity exception applies and the court therefore has subject matter jurisdiction." App. 105.

The District Court rejected that argument and granted OBB's motion to dismiss, finding "the connection between OBB and the Rail Pass Experts *too attenuated* to establish subject matter jurisdiction," where "plaintiff fails to establish that the commercial activity here was in fact undertaken by a 'foreign state'" as required. App. 109 (emphasis added). The District Court rejected Sachs's invocation of California agency law as the basis for finding RPE's sale to be activity carried on "by the foreign state," and instead relied upon the standard set forth by this Court in *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), as applied by the Ninth Circuit in *Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009) and the D.C. Circuit in *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843 (D.C. Cir. 2000). App. 105-07. The District Court noted that this standard establishes, in suits against a foreign state, that a principal-agent relationship arises where "a corporate entity is so extensively controlled by its owner" that it

rises to the level of "day-to-day control." App. 106-07. The District Court held that the commercial activity exception did not apply, because there was no evidence to satisfy the required degree of control. App. 106-09. Having found that it must dismiss on this basis, the District Court did not address the "based upon" requirement under the commercial activity exception, nor the other grounds for dismissal.

The Ninth Circuit Court of Appeals panel affirmed. Judge Tallman, in the decision of the Court, also applied *Bancec*, and held that there was no allegation of control sufficient to consider the Eurail Group's, much less RPE's actions, those of OBB. App. 68, 73-78. Judge Tallman observed that there could be no imputation to OBB where "Sachs does not allege day-to-day, routine involvement of OBB in Eurail Group, much less Rail Pass Experts," and no fraud or injustice would result. App. 76-78 (internal quotation omitted). Judge Bea concurred in the judgment, finding that the commercial activity exception was inapplicable under the alternative ground that the claims in the Complaint were not "based upon" commercial activity in the United States, but in Austria. App. 85-89. Judge Gould dissented. On the question of whether RPE's sale constituted activity "carried on by the foreign state," he rejected *Bancec*'s standard, and advocated a broad new rule: "[W]here a foreign common carrier, operated by a sovereign entity, purposefully sells tickets for use of the carrier's services overseas through a domestic sales agent, the ticket sale is commercial activity which may be

imputed to the foreign common carrier and is sufficient to invoke the commercial activity exception to sovereign immunity under §1605(a)(2) of the FSIA." App. 92-94. Judge Gould also found the "based upon" standard satisfied, reasoning that OBB's tort duty for all the claims "arose from the sale of the ticket for passage on OBB trains, the commercial activity identified by Sachs," and "which occurred in the United States." App. 96-98 (emphasis omitted).

Judge Gould was the only member of the original panel to sit on the *en banc* Court, where his prior positions in dissent became the *en banc* majority's in the opinion he authored. *See* App. 1. The opinion first held that "[a] foreign-state owned common carrier, such as a railway or airline, engages in commercial activity in the United States through a travel agent regardless of whether the travel agent is a direct agent or subagent of the common carrier." App. 4. The opinion first addressed the requirement that the activity be "carried on by the foreign state." App. 14. Based on the premise that "neither the statute nor the legislative history defines how the commercial activity within the United States must be 'carried on' but both suggest that the 'carried on by' requirement be interpreted in light of broad agency principles," the majority stated that "[u]nder traditional agency principles, the foreign state may engage in commerce in the United States indirectly by acting through its agents or subagents." App. 15. (internal quotations omitted). Relying on decisions from the Second and D.C. Circuits dealing with travel, but where agency

was not contested, *see* App. 16 n.5, the majority erroneously concluded that "[u]nder traditional theories of agency, RPE's act of selling the Eurail pass to Sachs within the United States can be imputed to OBB as the principal," App. 18-19.

The majority improperly rejected *Bancec*, holding that "the day-to-day control inquiry under *Bancec* makes no sense here where the question is 'whether a particular type of agency relationship is sufficient under the commercial activity exception.'" App. 21 (quoting *Dale v. Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006)). The majority also rejected OBB's contention that the plain language of the FSIA governs the inquiry. The majority held that the definition of "foreign state" in §1603(b) was inapplicable because "whether an entity meets the definition of an 'agency or instrumentality of a foreign state' to claim immunity is a completely different question from whether the acts of an agent can be imputed to a foreign state for the purpose of applying the commercial activity exception." App. 22-23 (internal quotations omitted). The majority replaced the plain text in the FSIA's definition with what it characterized as a "common sense" approach: "common sense also tells us that an agent that carries on commercial activity for a foreign state in the United States does not need to be an agency or an instrumentality of a foreign state under §1603(b)," relying on the premise that "[f]oreign sovereigns invariably must act through agents, and if they engage in commercial activity in the United States it will necessarily be through an

agent, whether that agent is its own employee or a separate company in an agency or subagency relationship." App. 23. The majority concluded that "[w]e cannot believe that . Congress intended" to "negate the possibility of commercial activity by a state-owned railway or airline within the United States through a travel agent." App. 25.

The majority also found the other elements of the commercial activity exception satisfied. The majority found that "[w]here a ticket for travel on a foreign common carrier is bought and paid for in the United States the substantial contact requirement is met." App. 32. The majority also found the "based upon" requirement satisfied, reasoning that "buying the Eurail pass from RPE was the start of Sachs's tragic misadventure," and that "the sale of the Eurail pass is an essential fact that Sachs must prove to establish her passenger-carrier relationship with OBB," which is "necessary to the 'duty of care' element" of Sachs's claims. App. 35-36; *see generally* App. 34-40.

Judge O'Scannlain, joined by then-Chief Judge Kozinski and Judge Rawlinson, dissented. App. 42. He observed that under the plain language of the FSIA, the "commercial-activity exception's use of 'foreign state,'" as informed by this Court's reasoning in *Samantar*, "indicates that the term does not embrace all authorized agents." App. 49-51. The dissent applied *Bancec*, and concluded there was no basis for imputing RPE's, much less the Eurail Group's, actions to OBB. App. 55-57.

Judge Kozinski also wrote a separate dissent on the alternative ground that the majority's "based upon" standard conflicted with this Court's decision in *Nelson*, under which it would not have mattered "if Austria were itself selling train tickets from a kiosk in Times Square," because here, "plaintiff's claim arises from events that transpired entirely in Austria." App. 61-62. Judge Kozinski reasoned that "plaintiff hasn't shown a sufficient nexus between her purchase and the injury," and that "the expansive sweep of the majority's approach" implicated the very "perils of an overly permissive reading of the FSIA's 'based upon' requirement" that were recognized by this Court in *Nelson*. App. 65-66.

The Petition to this Court followed.

SUMMARY OF THE ARGUMENT

The first clause of the FSIA's commercial activity exception provides a narrow exception to foreign sovereign immunity where "the action is based upon a commercial activity carried on in the United States by the foreign state." §1605(a)(2).

The exception is inapplicable to a suit, like this one, involving travel entirely outside the United States and alleging tort claims for personal injuries suffered outside the United States against a foreign state-owned railway, where the only commercial activity within the United States was the plaintiff's purchase of the travel ticket online through a United

States travel agency over which the foreign railway exercised no control and to which the foreign railway gave no direction.

In *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), this Court interpreted this provision and held that "[f]or there to be jurisdiction the [plaintiff's] action must be 'based upon' some 'commercial activity' by petitioners ['foreign state'] that had 'substantial contact' within the United States within the meaning of the Act." *Id.* at 356.

Indeed, when Sachs's lawsuit is assessed through the framework dictated by *Nelson*, the *en banc* majority's error, and the commercial activity exception's inapplicability, is manifest. This action is "based upon" the personal injuries resulting from OBB's purported tortious conduct at the train station in Innsbruck, Austria, and not the sale of the Eurail Pass by RPE to Sachs in the United States. Further, the sale of the Eurail Pass by RPE (at most a subagent of the Eurail Group, not OBB) is not commercial activity *by the foreign state* (OBB) under the FSIA.

First, the "based upon" requirement is not satisfied. This Court in *Nelson* held that a court must "begin [its] analysis by identifying the *particular conduct* on which the [plaintiff's] action is *'based'* for purposes of the Act." *Nelson*, 507 U.S. at 356-57 (emphasis added). This Court was precise: "activities [that] led to the conduct that eventually injured the [plaintiff] are *not* the basis for the [plaintiff's]

suit." *Id.* at 358. Rather, it is "[t]hose torts, and not the arguably commercial activities that preceded their commission, [that] form the basis for the [plaintiff's] suit." *Id.* Here, all of Sachs's claims allege personal injuries arising from her fall under the train at OBB's Innsbruck, Austria train station. *See* JA at 14-18 ¶¶1-20. It is those events that occurred in Austria, and not the arguably commercial activities that preceded their commission (*i.e.*, the Internet sale of the train ticket by RPE), that forms the basis for Sachs's lawsuit.

The Ninth Circuit, in ruling that the suit was "based upon" the ticket sale, fell into the same trap this Court warned against in *Nelson*. The "based upon" requirement cannot be satisfied merely because *one element* of the plaintiff's cause of action may be linked to the United States. In *Nelson,* this Court eschewed such element-by-element analysis, warning that it would invite "semantic ploy[s]" by plaintiffs, who "could recast virtually any claim of intentional tort" to include causes of action for failure to warn that would have an element linked to the United States, so as to circumvent the "based upon" requirement. *Nelson*, 507 U.S. at 363. Yet this is the precise approach taken by the Ninth Circuit. It examined the elements of each cause of action in order to find a purported nexus to the United States, holding that the duty element was triggered by the ticket sale by RPE, and that such sale alone satisfied the "based upon" requirement. *See* App. 32-40. This holding is contrary to *Nelson*, invites artful pleading,

and creates a problematic (in its foreign policy implications) and broad new rule: any sale of a ticket on a foreign-owned carrier by any travel agent in the United States can subject a foreign state to suit premised entirely on an injury suffered during travel or other activities occurring entirely outside the United States.

Second, the "by the foreign state" requirement is also not satisfied. The commercial activity exception does not apply to this action because the only commercial activity alleged to have been carried on in the United States was not commercial activity "by the foreign state" (OBB) under the FSIA.

This Court has held that the text of the FSIA is the starting and ending point of the analysis. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000); *see CSX Transp., Inc. v. Ga. State Bd. of Equalization*, 552 U.S. 9, 20 (2007). The plain text of the statute makes clear that the commercial activity exception only applies to "commercial activity *by the foreign state*." §1605(a)(2) (emphasis added).

"[F]oreign state" is specifically defined in §1603, which provides in relevant part:

> For purposes of this chapter—(a) A "*foreign state*", *except as used in section 1608 of this title*, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b). (b) An "agency or instrumentality of a foreign state" means any entity—(1) which is

> a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

§§1603(a) and (b) (emphasis added).

The term "foreign state" thus includes the foreign sovereign itself and a "political subdivision" or "agency or instrumentality of a foreign state," which in turn includes separate juridical entities, corporate or otherwise, that are either an "organ" of, or majority owned by, the foreign state. §§1603(a) and (b).

Congress unambiguously stated that this definition of "foreign state" applies to *all provisions* of the FSIA, except §1608 (the service of process provisions).[5] "*A 'foreign state', except as used in section 1608 of this title*, includes. " §1603(a) (emphasis added). Thus, Congress stated, in no uncertain terms, that the definition of "foreign state" applies to §1605, the commercial activity exception, and governs the use of the term "foreign state" in that exception. This means that the phrase "by the foreign state" in §1605(a)(2) can be interpreted only to include conduct of those

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[5] Foreign states and its agencies or instrumentalities are served in different ways under the FSIA, *see* §§1608(a)-(b).

entities defined in §1603 to constitute the foreign state. The statutory definition does not permit attribution to the foreign state of acts of third-parties that do not fit within the definition.

It is uncontested that OBB falls within the statutory definition of a "foreign state," while the Eurail Group and RPE do not. Accordingly, the alleged commercial activity of RPE (sale of the ticket) is not commercial activity "by the *foreign state*" (OBB). "[W]hen the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *Hartford Underwriters Ins.*, 530 U.S. at 7 (internal quotations omitted).

Although this Court need not look beyond the plain language of the statute, the result is reinforced by principles "common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies" espoused in the FSIA. *Bancec*, 462 U.S. at 622-23.

In *Bancec*, this Court held that for purposes of attribution of liability (which holding, as cited below, the Circuits have extended to the immunity determination), an agent-principal relationship arises "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created." *Bancec*, 462 U.S. at 629. This degree of "control" identified by *Bancec* is central to the creation of a principal-agent relationship under the FSIA. Even the United States concedes that it is

only "by virtue of the state's *direction and control* over the agent, [that] the state is effectively taking actions in the United States commercial market itself." U.S. Br. 9. Applying this "control" requirement, RPE's ticket sale cannot be imputed to OBB because of the absence of any evidence of control by OBB, as the District Court correctly found. App. 108. Thus, under the principles established in *Bancec,* the commercial activity of RPE is not attributable to OBB.

The *en banc* majority expressly disregarded *Bancec*. Relying instead on domestic common law of agency principles surrounding "ambiguous" agency relationships, *see* App. 18, the *en banc* court announced a sweeping new rule, holding that the actions of any United States-based travel agent – even one which OBB did not retain or contract with, direct, control or even know about – can be attributed to OBB for purposes of the commercial activity exception, *see* App. 4. The court made no attempt to analyze the relationship between OBB and RPE, or OBB and the Eurail Group, relying simply on the fact that RPE characterized itself as a "travel agent" and had sold the Eurail Pass to Sachs. The court's approach improperly allows the vagaries of state common law of agency to dictate when foreign sovereigns are immune from suit. That is contrary to Congress's intent that the FSIA establish a uniform federal standard.

For these independent reasons, the Court of Appeals must be reversed.

ARGUMENT

I. THE FSIA COMPREHENSIVELY GOVERNS THE LIMITED EXCEPTIONS TO FOREIGN SOVEREIGN IMMUNITY, INCLUDING THE COMMERCIAL ACTIVITY EXCEPTION

It is firmly established that "[t]he Foreign Sovereign Immunities Act 'provides the *sole* basis for obtaining jurisdiction over a foreign state in the courts of this country.'" *Nelson*, 507 U.S. at 355 (quoting *Amerada Hess Shipping*, 488 U.S. at 443) (emphasis added). "Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Id.*; *Permanent Mission*, 551 U.S. at 197 (same); §1604 ("a foreign state shall be immune from jurisdiction of the courts of the United States except as provided in sections 1605 to 1607. .").

This Court has been unequivocal as to the "*comprehensive*" scope of the FSIA, given that Congress emphasized that "[c]laims of foreign states to immunity should henceforth be decided by courts in conformity with the principles *set forth in this [Act].*" *NML Capital*, 134 S.Ct. at 2255-56 (quoting §1602 and compiling quotations from *Altmann*, 541 U.S. at 699; *Verlinden*, 461 U.S. at 493; *Samantar*, 560 U.S. at 313) (alteration added in *NML Capital*). The comprehensive scope of the FSIA is a byproduct of "the regime it replaced." *Id.* at 2255. "[A]fter the enactment of the FSIA, the Act – and not the pre-existing

common law – indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Id.* at 2256 (quoting *Samantar*, 560 U.S. at 313). Against this backdrop, "any sort of immunity defense made by a foreign sovereign in an American court *must stand on the Act's text. Or it must fall.*" *Id.* (emphasis added).

Sachs invokes only the first clause of the FSIA's commercial activity exception for subjecting OBB, a "foreign state," to jurisdiction in the courts of the United States. App. 104 & n.2. But the plain text of that exception dooms Sachs's argument. *See CSX Transp.*, 552 U.S. at 20 ("When we find the terms of a statute unambiguous, judicial inquiry is complete. ." (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)) (alteration in original.).

The first clause of the exception provides that a foreign state is not immune from jurisdiction in a suit "in which the action is based upon a commercial activity carried on in the United States by the foreign state." §1605(a)(2).

On its face, the exception is inapplicable because Sachs's suit for personal injuries suffered overseas in Austria is not "based upon" any commercial activity in the United States but, instead, is based upon the alleged condition of a train and rail platform in Austria.

This Court has addressed the text, meaning, and application of the first clause of the commercial activity exception on one prior occasion, in *Nelson,*

supra. This Court held that "[f]or there to be jurisdiction the [plaintiff's] action must be 'based upon' some 'commercial activity' by petitioners that had 'substantial contact' within the United States within the meaning of the Act." *Nelson*, 507 U.S. at 356.

Following *Nelson*'s framework, it is clear that the "particular conduct" this action is based upon, *see id.*, are the alleged events causing Sachs's injury at the train station, which occurred entirely in Austria, and not the preceding purchase of the Eurail Pass in the United States. The alleged tortious conduct of OBB occurred entirely in Austria, and has no "substantial contact" to the United States within the meaning of the FSIA.

In addition, the sale of the Eurail Pass by RPE, is not commercial activity "by the foreign state" (*i.e.*, OBB) within the meaning of the FSIA. It is undisputed that RPE does not satisfy the definition of a foreign state's "agency" under §1603. In that provision, Congress specifically declared that the definition applies to all other sections of the FSIA (with the sole exception of §1608), including §1605 which contains the commercial activity exception.

In the alternative, if this Court were to venture beyond the statutory definition, *Bancec* governs this determination, and the acts of RPE cannot be attributed to OBB because the necessary element of "control" by OBB over RPE is absent, so that the acts of the latter cannot constitute commercial activity "by the foreign state" under §1605(a)(2).

II. SACHS'S CLAIMS ARE "BASED UPON" HER INJURIES AT THE TRAIN STATION IN AUSTRIA – NOT THE SALE OF THE EURAIL PASS BY RPE IN THE UNITED STATES

A. Under *Nelson*, the "Gravamen" of Sachs's Complaint – and Thus the Allegations Her Claims Are "Based Upon" for Purposes of the Commercial Activity Exception – is the Alleged Tortious Conduct of OBB in Austria

As this Court explained in *Nelson*, "[w]e begin our analysis by identifying the *particular conduct* on which the [plaintiff's] action is *'based'* for purposes of the Act." *Nelson*, 507 U.S. at 356-57 (emphasis added).[6]

This Court recognized that "the Act contains no definition of the phrase 'based upon,' and the relatively sparse legislative history offers no assistance" (notwithstanding Congress's definition of nearly every other phrase in the first clause of the commercial activity exception, *see* §1603), but found that any such "guidance is hardly necessary." *Id.* at 357. Citing to dictionary definitions, this Court concluded that "the phrase is read most naturally to mean those elements

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[6] In *Nelson*, "[t]here [was] no dispute . . . that [petitioners] Saudi Arabia, the hospital, and Royspec all qualify as 'foreign state[s]' within the meaning of the Act." *Nelson*, 507 U.S. at 356 (citing §§1603(a), (b) and that the "term 'foreign state' includes 'an agency or instrumentality of a foreign state.' ").

of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* In doing so, the Court recognized Circuit Court authority that the "focus should be on the 'gravamen of the complaint,'" and "'the elements that prove the claim, no more and no less.'" *Id.* (quoting *Callegio v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985) (first quote) and *Santos v. Compagnie Nationale Air France*, 834 F.2d 890, 893 (7th Cir. 1991) (second quote)).

Thus, in the context of claims for personal injuries, this Court held that the inquiry should focus on the gravamen of the complaint, *i.e.*, the alleged tortious conduct that injured the plaintiff. It is "[t]hose torts, and not the arguably commercial activities that preceded their commission, [that] form the basis for the [plaintiff's] suit." *Id.* at 358.

A closer examination of *Nelson* informs the proper approach. The plaintiff had been recruited in the United States by HCA, an "independent corporation existing under the laws of the Cayman Islands[that] recruits Americans for employment at the [King Faisal Specialist Hospital in Riyadh] under an agreement signed with Saudi Arabia," to do engineering work at the hospital in Saudi Arabia. *Id.* at 351-52. Nelson signed an employment contract in the United States, went to the hospital, and after working there, was arrested at the hospital by Saudi police, and purportedly beaten and tortured before being released over a month later. *Id.* at 352-53. This Court summarized Nelson's 16 causes of action against Saudi Arabia, the hospital, and Royspec (all

three of which were "foreign states" under the FSIA, *see supra* n.6) as falling into three categories – intentional torts, negligently failing to warn Nelson of the dangers in his employment, and inflicting derivative injury from petitioners' actions. *Id.* at 353-54.

This Court, in its "based upon" analysis, recognized that "the Nelsons have alleged that petitioners recruited Scott Nelson for work at the hospital, signed an employment contract with him, and subsequently employed him." *Id.* at 358. But the Court *rejected* the contention that these actions were what the suit was "based upon":

> *While these activities led to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons' suit.* Even taking each of the Nelsons' allegations about Scott Nelson's recruitment and employment as true, *those facts alone entitle the Nelsons to nothing* under their theory of the case. *The Nelsons have not, after all, alleged breach of contract,*[7] *but personal injuries* caused by petitioners' negligent failure to warn Scott Nelson that they might commit those wrongs. *Those torts, and not the arguably commercial*

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[7] The Court noted that forum shopping was the presumed basis for the complaint's exclusive grounding in tort claims, rather than breach of contract. *See Nelson*, 507 U.S. at 354 ("Presumably because the employment contract provided that Saudi courts would have exclusive jurisdiction over claims for breach of contract, the Nelsons raised no such matters." (internal citation omitted)).

> *activities that preceded their commission, form the basis for the Nelsons' suit.*

Id. at 358 (emphasis added; internal citation omitted). Thus, the creation of the employment relationship or other contractual acts giving rise to a duty of care (which were the sole activities that occurred in the United States) were immaterial to the Court's "based upon" analysis in *Nelson*.

Indeed, the Court specifically rejected, and warned of the dangers in, any careful parsing of the elements of each particular cause of action. The Court recognized that, "[i]n addition to the intentionally tortious conduct, the Nelsons claim a separate basis for recovery in petitioners' failure to warn Scott Nelson of the hidden dangers associated with his employment" "at the time petitioners recruited Scott Nelson" in the United States. *Id.* at 363. But that, said this Court, was not what the Nelsons' claims were "based upon" for purposes of the commercial activity exception:

> But this is merely a semantic ploy. For aught we can see, a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it. To give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity.

Id. All of the claims were held to be "based upon" the defendants' alleged activities and the plaintiff's personal injuries, all of which occurred in Saudi Arabia.

Following this Court's reasoning in *Nelson* compels the same result here. The sale of the Eurail Pass in the United States, while arguably *leading* to the conduct that eventually injured Sachs, is not the basis for her suit. It is, thus, of no consequence that "buying the Eurail pass from RPE was the start of Sachs's tragic misadventure." App. 35. Sachs's injuries occurred entirely as the result of activities and conditions at the train platform in Austria. It makes no difference whether the Eurail Pass was sold in the United States, and "those facts alone entitle [Sachs] to nothing under [her] theory of the case." *See Nelson*, 507 U.S. at 358. Nor is it of any "jurisdictional significance," *see id.* at 363, whether the Complaint casts the causes of action as claims of negligence, strict liability, or breach of implied warranty. Sachs alleges personal injuries caused by OBB's purported negligence and defects in the railcars and platform in Austria. This Court was unequivocal that it is "[t]hose *torts*, and not the arguably commercial activities that preceded their commission" that form the basis for Sachs's suit. *See id.* at 358 (emphasis added).

B. The Ninth Circuit's Approach Distorts *Nelson* By Ignoring the Gravamen of the Complaint

The Ninth Circuit fundamentally erred in its analysis by ignoring the "gravamen" of the Complaint and construing the "based upon" requirement as demanding only that "*an element* of [her] claim consists in conduct that occurred in commercial activity carried on in the United States."[8] App. 33 (quoting *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000) (emphasis in *Sun*; alteration in *en banc*). But this Court, in *Nelson*, did not engage in any element-by-element analysis of the 16 different causes of action pleaded by Nelson. Nor was it even settled in *Nelson* what law would apply to the claims. *See* 507 U.S. at 374 (Kennedy, J., concurring in part and dissenting in part, observing that "the governing state law has not yet been determined"). The Ninth Circuit's separate element-by-element review of each claim, App. 33-36, 38-40, by its very nature, was a search into the *details* of each claim, rather than identifying the

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[8] Other Circuits have fallen into the same trap in their construction of the "based upon" requirement. *See e.g., Kirkham v. Societe Air France*, 429 F.3d 288 (D.C. Cir. 2005) (inquiring "whether the ticket sale is *one* of 'those elements of a claim that, if proven, would entitle [Kirkham] to relief under [her] theory of the case'" (quoting *Nelson*, 507 U.S. at 357) (emphasis added; alteration in *Kirkham*)); *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 892 (5th Cir. 1998) ("the act or activity must form the basis *of at least some element* of the cause of action" (emphasis added)).

"gravamen" and "basis" for the suit as this Court dictated in *Nelson*.

The Ninth Circuit did precisely what this Court warned against in *Nelson*: It gave "jurisdictional significance" to Plaintiff's artful pleading. The Ninth Circuit hinged jurisdiction on the legal elements of "Sachs's theory of the case, [that] OBB owed her a duty of care because her purchase of the Eurail pass established a common-carrier/passenger relationship." App. 34. But OBB owed Sachs a duty of care independent of her purchase of a Eurail Pass. Under traditional tort law railroads have a duty of reasonable care to passengers *and non-passengers* alike for physical harm caused by the railroad's own negligence and risks of harm.[9]

Similarly problematic is the Ninth Circuit's finding that the "implied warranty" counts provided a vehicle for invoking the commercial activity exception, citing California's Commercial Code for the proposition that "[a] transaction between a seller and a consumer is a necessary prerequisite" to these claims as well. App. 39. That finding not only ignored

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[9] The Comment to the Restatement (Third) of Torts §40(b) (2012), cited by the *en banc* majority, App. 34-35, provides that when "the *actor's conduct* might have played a role in creating the risk to the injured party, . . . the source of the duty of reasonable care is §7," §40 cmt. c (emphasis added), which is nothing more than the general tort rule that "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm," *id.* at §7. *See also id.* at §40 cmt. g; *contrast with id.* at §40 cmt. f, ill. 3.

the gravamen of the claim, it "g[a]ve jurisdictional significance to this feint of language," *Nelson*, 507 U.S. at 363.

First, California's Commercial Code applies only to the sale of goods, not to the sale of a ticket for services.[10] Yet, while refusing to consider "[w]hether Sachs has properly pleaded these claims," App. 38-39 & n.16, the Ninth Circuit used these claims as a basis for the commercial activity exception.

Second, just as "a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn," *Nelson*, 507 U.S. at 363, so too could a plaintiff convert virtually any personal injury tort claim for injuries suffered outside the United States on a foreign carrier into a contractual claim for breach of implied warranty when the ticket was purchased within the United States. Yet, the Ninth Circuit's analysis contravened *Nelson*'s direction that artful pleading should not control whether United States courts have jurisdiction over foreign states.

The Ninth Circuit's reasoning subjects foreign states to jurisdiction in the United States where a cause of action is legally meritless or carefully crafted to convert a tort claim into something else – simply

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[10] The Ninth Circuit cited to West's Ann. Cal. Com. Code §§2314(1), and 2315, App. 39, when the scope of the Commercial Code "applies to transactions *in goods*." West's Ann. Cal. Com. Code §2102 (emphasis added).

because it contains a single element that is purportedly linked to the foreign state's alleged commercial activity in the United States. Such a standard is contrary to *Nelson* and the purposes of the FSIA.

C. The Other "Travel Agent" Cases Relied Upon by the *En Banc* Majority Likewise Failed to Apply *Nelson*

The *en banc* majority relied on *Barkanic v. Gen. Admin. of Civil Aviation of the People's Rep. of China*, 822 F.2d 11 (2d Cir. 1987) and *Kirkham v. Societe Air France*, 429 F.3d 288 (D.C. Cir. 2005). *See* App. 15-18, 32, 34-35, 38, 57. Those cases are both distinguishable and, in light of *Nelson*, wrongly decided.

In *Barkanic*, 822 F.2d at 13, and *Kirkham*, 429 F.3d at 291-92, the defendant foreign state conceded that the sale of the ticket could be imputed to it or the issue was not disputed. Indeed, the *en banc* majority conceded that the attribution "issue was not explicitly raised in those opinions." App. 15-16 n.5. Here, no such concession was made by OBB.

Further, neither case correctly applied the principles in *Nelson*. *Barkanic* was decided before *Nelson* and inquired into whether a "*sufficient* nexus" existed between the ticket sale and injury, while post-*Nelson*, the Second Circuit has inquired into a "*significant* nexus" focused on the "gravamen" of the complaint. *Compare Barkanic*, 822 F.2d 11 (emphasis added), *with Kensington Intern. Ltd. v. Itoua*, 505 F.3d 147, 155-56 (2d Cir. 2007) (emphasis to "nexus" omitted).

And the D.C. Circuit in *Kirkham* sidestepped *Nelson*'s requirement that the "based upon" inquiry focus on the "gravamen" or "basis" of the suit, instead requiring only that "the ticket sale is *one of* 'those elements of a claim that, if proven, would entitle [Kirkham] to relief under [her] theory of the case.'" *Kirkham*, 429 F.2d at 295 (quoting *Nelson*, 507 U.S. at 357) (emphasis added; brackets in *Kirkham*).

This Court has clearly established that it is the subject "torts, and not the arguably commercial activities that preceded their commission, [that] form the basis for the [plaintiffs'] suit." *Nelson*, 507 U.S. at 358. The proper standard focuses on the "gravamen" of the action, and not on particular elements of the claims. The gravamen of Sachs's action is the condition of the train and train platform in Austria and the injuries that she claims resulted from those conditions. Her claims are therefore "based upon" the alleged events in Austria, not the United States.[11] Because Sachs cannot satisfy this element of the

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[11] The Ninth Circuit, after first "imputing the sale of the pass by RPE to OBB," concluded that the "sale creates 'substantial contact' with the United States." App. 31. This reversed the order of inquiry set forth in *Nelson*, which indicated that the "based upon" analysis came first, and the "substantial contact" issue last. *See* 507 U.S. at 356. Here, there was no "substantial contact" with the United States when the "based upon" inquiry is addressed first and focused upon the "gravamen" of the action. *See id.* at 370 (White, J., concurring) ("the Act does not grant the Nelsons access to our courts," because "petitioners' commercial conduct in Saudi Arabia, though constituting the basis of the Nelsons' suit, lacks a sufficient nexus to the United States").

commercial activity exception, the *en banc* opinion must be reversed.

III. THE NINTH CIRCUIT ALSO ERRED BECAUSE THE SALE OF THE EURAIL PASS WAS NOT COMMERCIAL ACTIVITY "BY THE FOREIGN STATE."

Sachs's invocation of the commercial activity exception independently fails because the sale of the Eurail Pass by RPE was not commercial activity by OBB. The first clause of the exception requires that the commercial activity on which the suit is "based upon" be "'commercial activity' by *petitioners*," *i.e.*, entities that "qualify as 'foreign state[s]' within the meaning of the Act" under §§1603(a) and (b)'s definition of "foreign state" and "agency or instrumentality of a foreign state." *Nelson*, 507 U.S. at 356-57 (emphasis added). Here, the only "commercial activity" alleged – the sale of the Eurail Pass by the RPE – was not commercial activity by OBB.

A. On its Face, the Commercial Activity Exception Applies Only to Activity by the Foreign State Itself or its Agencies or Instrumentalities as Defined in the FSIA.

As noted above, the applicability of the commercial activity exception "must stand on the Act's text. Or it must fall." *NML Capital*, 134 S.Ct. at 2256; *accord CSX Transp.*, 552 U.S. at 20. Where Congress

has plainly stated that the exception applies only to the commercial activity of a "foreign state" – and carefully defined the entities that constitute a "foreign state" – the courts are not free to extend the exception to the activities of other entities.

The plain text of the commercial activity exception is limited to activity "by the foreign state." §1605(a)(2). Congress took precise efforts in its statutory definitions to prevent ambiguity in the commercial activity exception on this point. *Compare* §1603 ("Definitions"), *with* §1605(a)(2) (first clause). "[F]oreign state" is the first term defined in the FSIA, and Congress was explicit that its definition applied "[f]or purposes of this chapter," *i.e.*, "Chapter 97-Jurisdictional Immunities of Foreign States," §§1602-1611, subject solely to one express exception – "except as used in section 1608 of this title" governing service of process. *See* §§1603 & 1603(a).

In other words, because Congress explicitly stated that the term "foreign state['s]" use in §1608 is the sole exception to that definition's application throughout the chapter, this definition of "foreign state" necessarily extends to the use of that term in the commercial activity exception in §1605(a)(2). *See United States v. Smith*, 499 U.S. 160, 167 (1991) ("Congress' express creation of these two exceptions convinces us that the Ninth Circuit erred in inferring a third exception. ").

Indeed, Congress's enumerated exception for §1608 forecloses any additional implied exceptions to

the definition of "foreign state." *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent."); *Law v. Siegel*, 134 S.Ct. 1188, 1196 (2014) ("The [Bankruptcy] Code's meticulous – not to say mind numbingly detailed – enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions."); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

Thus, the statutory definition of "foreign state" controls when interpreting what constitutes commercial activity "by the foreign state" under §1605(a)(2). *See Burgess v. United States*, 553 U.S. 124, 129-30 (2008) ("Statutory definitions control the meaning of statutory words in the usual case." (alteration in original) (quoting *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949))).

Notably, the FSIA's definition of "foreign state" in §1603(a) is not limited to the foreign sovereign, but extends to other entities, which "include[] a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." §1603(a). An "agency or instrumentality of a

foreign state" is defined as "mean[ing] any *entity*" "which is a separate legal person, corporate or otherwise," including "an organ of a foreign state," such as OBB, as well as corporations whose shares are majority owned "by a foreign state or political subdivision thereof," and in any event are incorporated under that country's laws. §1603(b) (emphasis added). The commercial activity exception's applicability to "commercial activity *by the foreign state*," on its face, and by definition, thus extends beyond activities by the foreign sovereign itself, and includes business activities carried on by the foreign sovereign through certain separate government-owned corporations enumerated in §1603. §1605(a)(2). Congress, in its definitions, made clear *which* entities' activities could be *attributed* as commercial activity "by the foreign state."

Glaringly, Congress nowhere said, either in the general definition of "foreign state," or in the language of the commercial activity exception, that activity "by the foreign state" further extends to actions by entities operating as *common law agents*. Rather, Congress reaffirmed in the FSIA's definitions that "[a] 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on *by such state* and having substantial contact with the United States." §1603(e) (emphasis added). When Congress clarified what the reference to conduct "by the foreign state" meant in the context of the first clause of the commercial activity exception, it reaffirmed that it is the activity carried on

"*by such state*," with no reference to common law "agents," "subagents," or, as held by the Ninth Circuit, "travel agents." §§1603(e) (emphasis added), 1605(a)(2).

Congress could have, but did not, draft the commercial activity exception as applying to "commercial activity by the foreign state *or an agent of such foreign state while acting within the scope of its agency.*" And, this Court has refused to extend who is a "foreign state" beyond the statutory definition. For example, in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), the issue was whether entities that did not fall within the definition of an instrumentality under §1603(b) could invoke immunity under the FSIA. This Court rejected the notion, holding that:

> The Dead Sea Companies, as indirect subsidiaries of the State of Israel, were not instrumentalities of Israel under the FSIA at any time. Those companies cannot come within the statutory language that grants status as an instrumentality of a foreign state to an entity a "majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof."

Id. at 474 (quoting §1603(b)(2)). "Section 1603(b)(2) speaks of ownership. The Dead Sea Companies urge us to ignore corporate formalities and *use the colloquial sense of the term.* They ask whether, in common parlance, Israel would be said to own the Dead Sea Companies. We reject this analysis." *Id.* (emphasis added). Under the FSIA, then, a "foreign state" is the

sovereign itself or a specifically defined entity that it *owns*. *Id.*[12]

Here, the definition of "foreign state" or "agency or instrumentality" does not apply to RPE because it is undisputed that RPE was not owned by OBB. *Dole* rejects the extension of the definition of "foreign state" to an entity that, at most, is *indirectly* related to OBB, separated by at least three intermediary entities none of which are majority-owned by OBB or owned by OBB at all. *See* JA at 30-31 ¶¶18-19. Extending the concept of commercial activity "by the *foreign state*" to any instance when tickets are sold through a "travel agent" would improperly do precisely what *Dole* rejected: "ignore corporate formalities and use the colloquial sense of the term." *See* 538 U.S. at 474. This Court has refused to stray from the statutory definition of a "foreign state" to include entities that do not satisfy the definition.

The Court's recent decision in *Samantar* is also on point. There, the defendant – a foreign official sued for human rights violations – argued that the immunity protections granted to a "foreign state" under the FSIA extended to its individual officials as well. *See Samantar*, 560 U.S. at 308-11. The Court

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[12] *Dole* emphasized that "[m]ajority ownership by a foreign state, not control, is the benchmark of instrumentality status," and that "[t]he statutory language will not support a control test that mandates inquiry in every case into the past details of a foreign nation's relation to a corporate entity in which it does not own a majority of the shares." *Dole*, 538 U.S. at 477.

rejected this argument, similarly holding that the definition of a foreign state in §1603 cannot be expanded to include individuals:

> Then, *in §1603(b), the Act specifically delimits what counts as an agency or instrumentality.* Petitioner argues that either "foreign state," §1603(a), or "agency or instrumentality," §1603(b), could be read to include a foreign official. Although we agree that petitioner's interpretation is literally possible, our analysis of the entire statutory text persuades us that petitioner's reading is not the meaning that Congress enacted.

Id. at 314-15 (emphasis added).

Here too, the FSIA specifies what kind of "*entity*" falls within the definition of "foreign state" and its "agencies," and it does *not* include common law agents, just as this Court in *Samantar* held it did not include individuals.

> It is true that an individual official could be an "agency or instrumentality," if that term is given the meaning of any thing or person through which action is accomplished. *But Congress has specifically defined "agency or instrumentality" in the FSIA, and all of the textual clues in that definition cut against such a broad construction.*"

Id. at 315 (emphasis added) (internal quotation and citation omitted). This Court held that, under the FSIA, the terms "agency or instrumentality" "mean[ ]" any entity matching the *specific characteristics* set

forth in §1603(b). *Id.* (quoting §1603(b)). Thus, in *Samantar*, this Court again refused to expand the concept of agency or instrumentality in the FSIA beyond the definition in §1603(b). As already discussed, here, Congress could have, and did not, extend the list of *entities* to common law agents, and *Dole* confirms that the entities falling within the scope of the "foreign state" under the FSIA are only those that expressly fall within the statutory definition.

As in *Samantar*, this is further confirmed by an "analysis of the entire statutory text," which, as relevant here, is the commercial activity exception itself. *See id.* By using the term "*by* the foreign state" in the commercial activity exception, *see* §1605(a)(2) (emphasis added), and reiterating that this means activity "carried on *by* such state," *see* §1603(e) (emphasis added), Congress reinforced its invocation of the statutory definition of "agency or instrumentality of a foreign state," *see* §1603(b), and in turn its intent that the exception apply to corporate activities carried on by the foreign state through its government owned corporations. Thus, the exception's application to "commercial activity carried on in the United States by the foreign state," §1605(a)(2); *see also* §1603(e), cannot be read to extend to commercial activity carried on by an entity simply operating as a common law agent or sub-agent of a "foreign state" because such entities do not fit within §1603(b).

Thus, as interpreted by this Court, because "foreign state" is defined and because that definition applies to the commercial activity exception, there is

no basis for a court to venture beyond the plain text to expand the "foreign state," as the Ninth Circuit has done by invoking the common law and disregarding §1603. Nothing in the FSIA suggests that Congress intended courts to expand the definition of the "foreign state" by reference to domestic common law. *Cf. Samantar*, 560 U.S. at 319 ("Reading the FSIA as a whole, there is nothing to suggest we should read 'foreign state' in §1603(a) to include an official acting on behalf of the foreign state, and much to indicate that this meaning was not what Congress enacted.").

In sum, it is uncontested that the RPE is *not* an agency, instrumentality or organ of OBB as defined in the FSIA. Under the plain text of the FSIA, then, RPE's commercial activities cannot be attributed to OBB, and cannot constitute acts "by" OBB, for purposes of the sovereign immunity determination.

B. International Law at the Time of the FSIA's Enactment Confirms that the FSIA's Definition of "Foreign State" Extends to Both Immunity and Attribution

The Court need not look beyond the statutory definition of a "foreign state." But if the Court were to do so, international law at the time of the FSIA's enactment confirms that what constitutes commercial activity "by the foreign state" for purposes of the commercial activity exception is limited

to the conduct of entities satisfying the definition enacted in the FSIA.

Because one of the FSIA's purposes was the "codification of international law at the time of the FSIA's enactment," this Court has looked to the Restatement (Second) of Foreign Relations Law of the United States (1965), which is "[t]he most recent restatement of foreign relations law at the time of the FSIA's enactment," in interpreting the statute. *See Permanent Mission*, 551 U.S. at 199-200; *accord Samantar*, 560 U.S. at 312 n.6, 314, 321.

The Restatement addresses who "[t]he immunity of a foreign state : extends to," and whose conduct "is attributable to the state." Restatement (Second) Foreign Relations Law §§66, 169. These sections parallel each other.

The immunity section provides:

> The immunity of a foreign state under the rule stated in §65 extends to (a) *the state itself*; (b) its head of state and any person designated by him as a member of his official party; (c) *its government or any governmental agency*; (d) its head of government and any person designated by him as a member of his official party; (e) its foreign minister and any person designated by him as a member of his official party; (f) any other public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state;

> (g) *a corporation created under its laws and exercising functions comparable to those of an agency of the state.*

Id. at §66 (emphasis added).

Correspondingly, the "General Rule as to Attribution" states:

> Conduct of any *organ or other agency of a state*, or of any official, employee, or other *individual agent* of the state or of such agency, that causes injury to an alien, is attributable to the state within the meaning of §164(1) if it is within the actual or apparent authority, or within the scope of the functions, *of such agency* or *individual agent*.

Id. at §169 (emphasis added).

Thus, with respect to other *entities*, both immunity and attribution of conduct extended to any "agency" of the foreign state, as well as government owned corporations. *See id.* at §66; *see also id.* at §169 cmt. b (subject to certain exceptions, "[t]he term 'agency' as used in this Section includes any commercial enterprise owned by a state"). Moreover, "[t]he term 'agency' as used in this Section means a body having the nature of a government department or ministry. *It does not include every person or entity acting as an agent for a state.*" *See id.* at §66 cmt. a (emphasis added).[13]

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[13] *See also* Restatement (Second) Foreign Relations Law §169 cmt. c (referring separately to an "individual agent of the

(Continued on following page)

These principles, as they apply to *entities*, are reflected in the FSIA, where the definition of "foreign state" extends to an "agency" of a foreign state, which in turn includes its "organs" and government-owned corporations. *See Samantar*, 560 U.S. at 314-21 (citing Restatement §66 among others); §§1603(a), (b). And the Restatement confirms, as is apparent from Congress's definition of "foreign state" (including its use in the commercial activity exception) – that this definition, which does *not* include entities acting as common law "agents," is applicable for determinations as to who may claim immunity, as well as whose conduct may be attributed to the foreign state. Thus, the Ninth Circuit's assertion that "[w]hether an entity meets the definition of an 'agency or instrumentality of a foreign state' to claim immunity is a 'completely different question' from whether the acts of an agent can be imputed to a foreign state for the purpose of applying the commercial-activity exception," is wrong. *See* App. 22-23.

The definition of "foreign state" in the FSIA and Restatement – whether for purposes of immunity or attribution – show that both extend to an "agency" of a foreign state, including its government-owned corporations, and does *not* extend to entities acting as common law "agents." Thus, the acts of RPE cannot

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state or of such agency," with the term "individual agent" specifically defined to "include[ ] any official, employee, member of the armed forces, or other individual employed by or authorized to act on behalf of the state or any agency of the state.").

be attributed to OBB for purposes of the commercial activity exception.

C. In the Alternative, the Principles Articulated in *Bancec* Should Guide the Inquiry into Attribution for Purposes of the Commercial Activity Exception.

Even if this Court looked beyond the FSIA's plain terms, the commercial activity exception would *not* extend broadly to any time a ticket is sold "in the United States through a travel agent," nor to the specific facts of this case. *See* App. 4. Instead, any attribution inquiry should be dictated by the precepts of the restrictive theory of international law that Congress sought to codify, cognizant that, "[w]hen it enacted the FSIA, Congress expressly acknowledged 'the importance of developing a uniform body of law' concerning the amenability of a foreign sovereign to suit in United States courts." *Bancec*, 462 U.S. at 622 n.11 (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 32 (1976) (*House Report*)).

This is the approach endorsed by this Court in *Bancec*. That case involved Citibank's counterclaim against Bancec, a Government of Cuba-created bank, and "instrumentality" of the "foreign state" under the FSIA. *Id.* at 613-17. Citibank asserted a right to set off the value of its assets that had been seized by the Cuban government against its debt to Bancec. *Id.* at 614-15. The key question was not whether Bancec had immunity under the FSIA (it was undisputed

that Bancec, as the party that originated the lawsuit, was foreclosed under the FSIA from asserting immunity, *see id.* at 619-20) but whether, for purposes of the counterclaim, "the FSIA prohibits holding a foreign instrumentality owned and controlled by a foreign government responsible for actions taken by that government," *i.e.*, Cuba's nationalization of Citibank's assets. *Id.* at 620.

This Court held that the FSIA did not impose such a prohibition, because "[t]he language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state," including "'whether the proper entity of a foreign state has been sued.'" *Id.* (quoting *House Report* 12). But it concluded that "[n]evertheless, our resolution of that question is guided by the policies articulated by Congress in enacting the FSIA." *Id.* at 621. This Court turned to principles "common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies." *Id.* at 623. Examining those principles, the Court articulated two instances where such attribution would be permitted: (1) "*where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created*"; or (2) when failing to recognize such attribution "would work fraud or injustice." *Id.* at 629 (emphasis added).

Bancec is instructive because it addressed questions of attribution (though in the context of liability rather than sovereign immunity), and is grounded in principles set forth in the FSIA, including codification of international common law and Congress's uniformity interest. Circuit Courts, including the Fifth Circuit and D.C. Circuit, have held that *Bancec* guides the question of what commercial activity may be attributed to the foreign state for purposes of the commercial activity exception. *See Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533, 535-37 (5th Cir. 1992); *Transamerica Leasing*, 200 F.3d at 847-54 (D.C. Circuit).

A similar examination of international common law and federal common law on agency reveals that "control" is a fundamental and critical element needed to create a principal-agent relationship. *Bancec* is illustrative, in finding that extensive control *on its own* can give rise to a principal-agent relationship under international and federal common law principles. *Bancec*, 462 U.S. at 629. Moreover, even outside the alter ego context, the United States in this case has agreed that "direction and control" were necessary elements for attributing the conduct of any agent to the "foreign state" for FSIA purposes under federal common law, U.S. Br. 8-9, as consistent with international practice, U.S. Br. 9-10 (citing The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Pt. 1, ch. II, art. 8, U.N. Doc. A/RES/56/83,

at 3 (Jan. 28, 2002); State Responsibility: Comments and observations received from Governments, U.N. Doc. A/CN.4/488, at 41 (Mar. 25, 1998)).

Applying *Bancec* and the fundamental requirement of "control" embodied under international and federal common law, RPE's actions cannot be attributed to OBB. Fatal to Sachs's claim, as the District Court observed, is that there is *no evidence*, or even allegation, that OBB exercised any degree of direction or control, or element of control, over RPE. This is unsurprising given the attenuated connection. At most, RPE may be presumed to have been a *subagent* of an unidentified *general sales agent* accredited by the *Eurail Group*, not OBB itself. JA at 30-31 ¶18. Also, no evidence was offered that OBB, as just one of 30 members of the Eurail Group, exercised sufficient direction and control to make the *Eurail Group*'s actions attributable to OBB under a principal-agent relationship, much less sufficient direction and control to cover what are at least three degrees of corporate separation between OBB and RPE. Indeed, there was no evidence that OBB even knew RPE existed prior to the filing of this suit.[14]

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[14] The FSIA requires a shifting burden. Defendants first "establish[ ] their prima facie entitlements to sovereign immunity by proving only that they qualif[y] as 'foreign states' under 28 U.S.C. §1603(a)-(b)." *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 305 (9th Cir. 1997), *cert. denied*, 535 U.S. 987 (2002). "Once a foreign state makes a prima facie showing of immunity, the plaintiff seeking to litigate in the United States then has the burden of showing that an exception applies." *Gen. Elec. Capital*

(Continued on following page)

The Ninth Circuit did not hold to the contrary as to the facts. Instead, it rejected the principles in *Bancec* directly, stating that "[t]he day-to-day control inquiry under *Bancec* makes no sense here," and disregarded the notion that *any control at all* was required by a common carrier over a "travel agent" before imputing that sale as commercial activity by the foreign state. App. 4, 21. The only "facts" upon which the Ninth Circuit relied to find that RPE's acts should be attributed to OBB was that RPE was a travel agent that sold the Eurail Pass, as "a subagent of OBB through Eurail Group," because "Eurail Group markets and sells rail passes for transportation on OBB's rail lines, making Eurail Group an agent of OBB." App. 4, 18. That holding is inconsistent with *Bancec*, international law, and federal common law of agency. The Ninth Circuit made no finding that evidence of "direction and control" existed between RPE and the Eurail Group, or between the Eurail Group and OBB, much less between RPE

Corp. v. Grossman, 991 F.2d 1376, 1382 (8th Cir. 1993); *accord, Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 241 (2d Cir. 2002) ("[I]n a challenge to FSIA subject matter jurisdiction, the defendant must present a *prima facie* case that it is a foreign sovereign. . . . Then, *the plaintiff* has the *burden of going forward* with evidence showing that, under exceptions to the FSIA, immunity should not be granted." (emphasis in original) (internal quotations omitted)). OBB's motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, and Sachs's opposition, were fact-based. *See* Dist. Ct. Docket 43 at 1; *see also* Dist. Ct. Docket 44-45, 58-59.

and OBB. Thus, application of *Bancec*'s principles also compels reversal.

D. The Ninth Circuit's Approach is Inconsistent with the Text and Intent of the FSIA, Yields an Unreasonable Pro-Jurisdiction Answer, and Strains the Reaches of Jurisdiction.

1. The Ninth Circuit's Reliance Upon Purported Domestic Common Law Sub-Agency Principles Conflicts with the Plain Text and the FSIA's Purposes.

Rather than apply the plain text of the statute, or international and federal common law on attribution and agency as dictated by *Bancec*, the *en banc* majority adopted Sachs's position and stated that it was relying on domestic common law of agency principles – principles that vary from state to state and are unmoored from the foundational component of control. Sachs, for her part, has consistently grounded her attribution argument in California agency law, *see* Ninth Cir. Docket 7-2 at 12, and the *en banc* majority likewise predicated its decision that travel agents are "agents" of a common carrier upon a citation to an obscure section of the Restatement entitled "[a]mbiguous relationships," while eschewing the bedrock requirement that an agency relationship requires

control by the principal.[15] *See* App. 18 (citing Restatement (Third) Agency §3.14 cmt. c (2006)); App. 21.

The *en banc* majority's reasoning in rejecting the FSIA's plain text is contrary to basic canons of statutory construction and purposes of the FSIA.

First, and most fundamentally, the Ninth Circuit ignored the FSIA's clear, unequivocal definition of "foreign state," arguing that its extension to "an agency or instrumentality of a foreign state" only "defines what type of entity can be considered a foreign state for purposes of claiming sovereign immunity," a separate question, according to the Ninth Circuit, from "whether the acts of an agent can be imputed to a foreign state for the purpose of applying the commercial activity exception." App. 22-23 (internal quotation omitted).

But the definition of "foreign state" does not vary from section to section within the FSIA. Congress did

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[15] In contrast, acting *"subject to the principal's control"* is fundamental to establishing a principal-agent relationship. Restatement (Third) Agency §1.01 ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and *subject to the principal's control*, and the agent manifests assent or otherwise consents to act." (emphasis added)); Restatement (Second) Agency §1(1) (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and *subject to his control*, and consent by the other so to act." (emphasis added)).

not say "foreign state" has one definition as applied to the invocation of immunity, and another as to attribution for purposes of the exception to immunity. Instead, that definition applies *throughout the Act* and in *all its uses*, subject to Congress's sole and express exception when that term is used in §1608 governing service of process. *See* §1603(a). "[F]oreign state" thus does not mean something else when used in the commercial activity exception. *See* §§1603(a), 1605(a)(2).

Further, international law at the time of the FSIA's enactment indicates that the definition of "foreign state," as applied to entities, was congruent with respect to both immunity and attribution. Restatement (Second) Foreign Relations Law §§66, 169.

The Ninth Circuit's contention that "[c]ommon sense tells us that an agent that carries on commercial activity for a foreign state in the United States does not need to be an agency or instrumentality of a foreign state under §1603(b)" misses the point. App. 23. Such an approach was rejected in *Samantar*, which declined to expand the definition based on what may be "literally possible," holding that §1603(b) "specifically delimits what counts as an agency." 560 U.S. at 314-15.

Thus, the FSIA definitions address attribution of other entities' conduct in the immunity context, and extended it to an "agency" of a "foreign state," *i.e.*, commercial activity "by such state" – no more and no less. Such entities include separate juridical

"corporate" persons that can, and have in other cases, *see Nelson*, 507 U.S. at 351 (as to Royspec) and *Bancec*, 462 U.S. at 613-16, carried on commercial activity within the United States. Thus, here, where the issue is whether actions taken by a separate juridical entity may be attributed to the foreign state for immunity purposes under the commercial activity exception, the inquiry turns exclusively upon whether that entity is an "agency or instrumentality of a foreign state" as defined by the FSIA. Here, it is undisputed that RPE does not fall within that definition; thus, its acts cannot be attributed to OBB.

Second, the *en banc* majority's "presumption that the [FSIA] maintains common-law principles," and that Congress did not "intend[ ] to displace common-law agency principles under the statute for purposes of assessing commercial activity within the United States," is also wrong. App. 24. As this Court made clear in *Samantar*, that canon of construction only applies with respect to the "field formerly governed by the common law." *Samantar*, 560 U.S. at 320-21 (recognizing canon, but holding it inapplicable where FSIA did not codify "the common law with respect to the immunity of individual officials"). The FSIA, however, was not intended to codify the state common law of *agency*. Rather, its purpose was "codification of *international law* at the time of the FSIA's enactment." *Id.* at 320 (emphasis added) (quoting *Permanent Mission*, 551 U.S. at 199). It is *this* "common law and international practice" that is appropriate to examine "when interpreting the Act." *Id.* As already

addressed, international law, as expressed by the Restatement, *Bancec*, and the International Law Commission, are all consistent in foreclosing attribution of R[redacted] ticket sale to OBB for immunity purposes.

[redacted]rd, the Ninth Circuit's invocation of state co[redacted]on law agency principles is contrary to the FSIA's "*comprehensive*" scope. *See NML Capital*, 134 S.Ct. at 2255-56 (emphasis in original). Congress's interest in uniformity was clear in its declaration of purpose. *See* §1602. Further, the legislative history explained that the FSIA "is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities." *House Report* 12. Yet the Ninth Circuit frustrates Congress's intent by making the commercial activity exception rise and fall upon state common law agency and sub-agency principles entirely and expressly divorced from the principle of "control" fundamental to international law. This is highlighted here, where jurisdictions vary widely as to whether travel agents are in fact to be legally treated as "agents." Indeed, the Restatement of Agency provision relied upon by the *en banc* majority for holding RPE to be OBB's agent is a comment entitled "Ambiguous Relationships." App. 18 (quoting Restatement (Third) Agency §3.14 cmt. c.). And that provision goes on to highlight variations from court-to-court on whether travel agents are in fact "agents."

Indeed, another decision from the Ninth Circuit never mentioned by the *en banc* majority highlights the error of assuming that an entity calling itself "travel agent" is actually an "agent" even under common law. In *Harby v. Saadeh*, 816 F.2d 436, 439 (9th Cir. 1987), the court held that a travel agent did *not* act as an "agent" for Kuwait Airlines in selling a travel ticket because "[c]ontrol is a crucial element missing from the relationship between Kuwait Airlines and Saadeh," where he was "not supervised or 'controlled' by any one carrier or group of carriers." Under *Harby*, as under international common law, RPE's conduct could not be imputed to OBB. The *en banc* majority's holding that a "travel agent" is always an agent of a common carrier, is unsupportable.

Finally, the Ninth Circuit openly, and improperly, elevated its policy determinations over those expressed by Congress. It defended its conclusion that OBB was subject to suit due to RPE's actions, on the basis that a contrary ruling grounded in the plain text or *Bancec*'s principles "would negate the possibility of commercial activity by a state-owned railway or airline within the United States through a travel agent. We cannot believe that this is what Congress intended." App. 25. This Court, however, has rejected such an approach to interpreting the FSIA. As this Court has explained, any such "riddle is not ours to solve (if it can be solved at all),. '[T]he question is not what Congress would have wanted but what Congress enacted in the FSIA.'" *NML Capital*,

134 S.Ct. at 2258 (third alteration in original) (quoting *Weltover*, 504 U.S. at 618).

Congress enacted a limited exception for commercial activity "by the foreign state," which included actions by the foreign state itself, as well as its "agenc[ies] or instrumentalit[ies]." *See* §§1603(a)-b), 1605(a)(2). The Ninth Circuit erred in reaching beyond those definitions.

2. The Ninth Circuit's Standard Adopts the Very Type of Pro-Jurisdiction Test this Court has Emphatically Rejected

The "agency theory" propounded by the *en banc* majority for subjecting foreign states to suit under the commercial activity exception does precisely what this Court chastised the Ninth Circuit for last term: formulating an "agency theory" for foreign entities that "stacks the deck" so as to "always yield a pro-jurisdiction answer." *Daimler AG v. Bauman*, 134 S.Ct. 746, 759-60 (2014).

Here, too, the Ninth Circuit has created a black letter rule that "[a] foreign-state owned common carrier, such as a railway or airline, engages in commercial activity in the United States when it sells tickets in the United States through a travel agent." App. 4. This *per se* rule eschews consideration of the element of "control" foundational to agency, and applies "regardless of whether the travel agent is a direct agent or subagent of the common carrier," thus

"always yield[ing] a pro-jurisdiction answer." *See* App. 4; *Daimler AG*, 134 S.Ct. at 759.

The Ninth Circuit's decision also significantly diminishes the "based upon" requirement because it ignores the gravamen of the action and, instead, allows plaintiffs to plead, and courts to rely on, any single legal element that may have a connection to the United States, in disregard of *Nelson*.

As this Court has stated, the Ninth Circuit's "expansive view[s]" of jurisdiction "pa[y] little heed to the risks to international comity." *Daimler AG*, 134 S.Ct. at 763.[16] It was recognized in *Daimler* that such an "expansive view" of agency in the context of general jurisdiction over a foreign *corporation* had "impeded negotiations of international agreements" and led to "international friction." *Id.* "Considerations of international rapport," *see id.*, are that much more pronounced here when dealing with the assertion of jurisdiction over the *foreign state* itself, rather than a privately owned foreign corporation. Indeed, "[a] primary purpose of the FSIA is to make it difficult for private litigants to bring foreign governments into

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[16] Most Circuits (in contrast to the Ninth Circuit's broad approach) have held that the commercial activity exception, like other FSIA exceptions, must be narrowly construed. *See e.g.*, *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1075 (D.C. Cir. 2012) ("The FSIA established a broad grant of immunity for foreign sovereigns that can only be abrogated by one of the statute's narrowly drawn exceptions."); *Garb v. Republic of Poland*, 440 F.3d 579, 587 (2d Cir. 2006) (interpreted commercial activity exception "narrowly").

court, thereby avoiding affronting them." *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 207 (3d Cir. 2003).

Here, the Ninth Circuit's holding has already generated the attention of the international community, with the Netherlands stating that the Ninth Circuit's holding creates a "substantial risk of jurisdictional and diplomatic conflict," Government of the Kingdom of the Netherlands Amicus Br. 1-2, and the International Rail Transport Committee contending that, if the holding stands, it will "fundamentally alter the way Eurail passes are marketed and sold, to the detriment of American travelers," International Rail Transport Committee Amicus Br. 2, 14.

The Ninth Circuit's holding, if permitted to stand, would create the untenable anomaly that it is easier for a plaintiff to obtain jurisdiction in the courts of the United States over a foreign *state* than a foreign *corporation*. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (no personal jurisdiction over foreign corporation for injuries to U.S. citizens while traveling abroad on foreign corporation's helicopter, despite negotiations for travel occurring in the United States); *see also J. McIntyre Mach. Ltd. v. Nicastro*, 131 S.Ct. 2780, 2786, 2790-91 (2011) (no personal jurisdiction over foreign corporation J. McIntyre because there was no "purposeful availment" where "J. McIntyre itself did not sell its machines to buyers in this country beyond the U.S. distributor, and there is no allegation that the distributor was under J. McIntyre's *control*." (emphasis added)). This would be an affront to the

presumptive immunity of foreign states from suit under the FSIA, *see Nelson*, 507 U.S. at 355, and disregards concerns of international rapport and that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *See Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cnty.*, 480 U.S. 102, 115 (1987); *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 239 (2007) (Kennedy, J., concurring; Alito, J., joining) ("When Congress acted through the [FSIA] to codify certain protections and immunities for foreign sovereigns and the entities of those sovereigns, it no doubt considered its action to be of importance for maintaining a proper relationship with other nations.").

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the Complaint dismissed on the basis of OBB's foreign sovereign immunity.

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April 17, 2015

Relevant Excerpts of the Foreign Sovereign Immunities Act

28 U.S.C. §1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

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28 U.S.C. §1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the

rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

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28 U.S.C. §1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

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28 U.S.C. §1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

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28 U.S.C. §1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

* * *

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

* * *

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28 U.S.C. §1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in

accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

RESPONDENT'S BRIEF

No. 13-1067

IN THE

Supreme Court of the United States

OBB PERSONENVERKEHR AG,

Petitioner,

v.

CAROL P. SACHS,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

The questions presented in the petition are:

1. Whether, for purposes of determining when an entity is an "agent" of a "foreign state" under the first clause of the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2), the express definition of "agency" in the FSIA, the factors set forth in *First National City Bank v. Banco para el Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611 (1983), or common law principles of agency, control.

2. Whether, under the first clause of the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2), a tort claim for personal injuries suffered in connection with travel outside of the United States is "based upon" the allegedly tortious conduct occurring outside of the United States or the preceding sale of the ticket in the United States for the travel entirely outside the United States.

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BRIEF FOR RESPONDENT

Respondent Carol Sachs respectfully requests that this Court affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

INTRODUCTION

In general, injured customers have recourse against commercial enterprises responsible for their injuries. And so long as their suit arises from a commercial activity that has substantial contact with the United States, American customers may litigate their claims at home, rather than seek redress an ocean away. This case is no different, save that a foreign state happens to operate the commercial enterprise. Under the commercial activity exception of the Foreign Sovereign Immunities Act of 1976, that makes no difference.

STATEMENT OF THE CASE

A. Legal And Factual Background

1. Until the mid-twentieth century, the United States and the rest of the international community adhered to an absolute rule of sovereign immunity. Under this regime, no sovereign state could be haled into another's court against its will. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983).

Eventually, states came into more frequent contact with foreign citizens as everyday participants in burgeoning global markets. *See generally* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 (1976) ("Tate Letter"). And with more

interactions came more disputes. As a result, the international community increasingly saw "no justification" for allowing a foreign state that "enters the marketplace" to thrust the economic costs of accidents it causes "onto the shoulders of private parties." *Saudi Arabia v. Nelson*, 507 U.S. 349, 366 n.2 (1993) (White, J., concurring in the judgment) (quoting *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong., 2d Sess. 27 (1976) (statement of Monroe Leigh, Legal Adviser, State Department)).

Accordingly, many states adopted the so-called "restrictive" theory of sovereign immunity, which restricts immunity to public (or sovereign) acts and denies it for private (or commercial) acts. Tate Letter. The United States Department of State soon followed suit. *Id.* But while official American policy changed, courts still looked to the State Department on a case-by-case basis to decide whether a foreign state should receive immunity. *Verlinden*, 461 U.S. at 487. Diplomatic pressure often trumped fealty to the restrictive theory. *Id.* Inconsistency reigned.

Two decades later, Congress passed the Foreign Sovereign Immunities Act of 1976 ("the FSIA") to codify the restrictive theory so that courts would make immunity decisions according to clear legal rules. *See* 28 U.S.C. § 1602; *Verlinden*, 461 U.S. at 488. The Act's "comprehensive set of legal standards," *Verlinden*, 461 U.S. at 488, now governs both subject-matter and personal jurisdiction over a foreign sovereign in the United States. *See* 28 U.S.C. § 1330(a)-(b).

The FSIA provides for jurisdiction in federal court for claims against foreign states through a series of exceptions to immunity. *See* 28 U.S.C. §§ 1605, 1607. The "most significant" of these is the commercial activity exception. *Republic of Argentina v. Weltover*, 504 U.S. 607, 611 (1992). It ensures that foreign states do not evade legal accountability "insofar as their commercial activities are concerned." 28 U.S.C. § 1602. And "a foreign state engages in commercial activity . . . where it acts 'in a manner of a private player within' the market." *Nelson*, 507 U.S. at 360 (quoting *Weltover*, 504 U.S. at 614).

The commercial activity exception contains three distinct clauses. Clause One – the clause at issue here – denies sovereign immunity where an action is "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). In other words, foreign states are not immune from suit in actions arising from "either a "regular course of commercial conduct" or a "particular commercial transaction or act" that has "substantial contact" with the United States. *See id.* § 1603(d)-(e) ("Definitions"). Clause Two denies immunity in actions based "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." *Id.* § 1605(a)(2). And Clause Three denies immunity for actions based "upon an act outside the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *Id.*

2. In 2007 – when the events here took place – some 20 million tourists visited Austria, spending over $18 billion. UN World Tourism Org., *Tourism*

Highlights: 2008 Edition 5 (2008).[1] Much of this tourism involved getting from place to place. Visitors traveled between remote resorts in the Alps; medieval landmarks in the countryside (such as Hohenwerfen Castle, as seen in *The Sound of Music*); and historic cities such as Vienna, Salzburg, and Innsbruck. So for petitioner Österreichishe Bundesbanen Personenverkehr ("OBB"), a passenger railway wholly owned by the Austrian government, Pet. App. 5a, tourists traversing the country were (and continue to be) a bountiful target market.

To attract more foreign riders, OBB and several other European railways formed and collectively own the Eurail Group, which markets and sells "Eurail passes." Pet. App. 5a. Long a favorite of American travelers on a budget, these passes offer myriad low-price ticketing packages for travel on OBB throughout Austria. *See* Neth. Bd. of Tourism & Conventions, *More Students Explore Europe By Train*, Globe News Wire (Sep. 28, 2009);[2] *Eurail Passes*, Eurail.[3] The passes are not available to Austrian citizens. *See Eurail Passes*, *supra*. Instead, Eurail markets these passes exclusively to foreigners and even offers free delivery to the United States. *Id.*

In 2007, some 468,000 tourists bought Eurail passes. Felicity Long, *Amid Ridership Increase, Eurail Expands, Unveils New Passes*, Travel Weekly,

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[1] http://www.unwto.org/facts/eng/pdf/highlights/UNWTO_Highlights08_en_HR.pdf (last visited June 25, 2015).

[2] http://globenewswire.com/news-release/2009/09/28/405408/174142/en/More-Students-Explore-Europe-by-Train.html (last visited June 25, 2015).

[3] http://www.eurail.com/eurail-passes (last visited June 25, 2015).

(Feb. 25, 2011).[4] Over half were American. *Eurail Passenger Growth Positive, Setting a New Record*, Eurail Group (April 1, 2008).[5]

In addition to making direct-to-consumer sales online, the Eurail Group contracts with a network of subagents based in the United States to market and sell Eurail passes to Americans. On its website, OBB tells customers as much, stating that the "Eurail Austria Pass can be purchased" through "travel agencies in [sic] overseas." *Eurail Austria Pass*, OBB.[6] The Rail Pass Experts ("RPE"), based in Massachusetts, is one such subagent. RPE markets itself as "the largest single train ticket and rail pass outlet in the U.S." and advertises its status as Eurail's "official agent." *About Us*, RailPass.[7]

3. In 2007, RPE sold respondent Carol Sachs a Eurail pass allowing her to travel on OBB within Austria, as well as to the Czech Republic. Pet. App. 5a. Sachs bought the ticket on RPE's website from her home in California. *Id.* This pass entitled her to board the train and sit in an unassigned seat. *Id.* 6a; Petr. Br. 10. The pass also made clear that "the issuing office is merely the intermediary of the carriers in Europe and assumes no liability resulting from the transport." Pet. App. 5a.

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[4] http://www.travelweekly.com/Europe-Travel/Amid-ridership-increase-Eurail-expands-unveils-new-passes (last visited June, 25, 2015).

[5] http://www.eurailgroup.org/News/Eurail%20passenger%20growth%20positive%20setting%20new%20record.aspx (last visited June 25, 2015).

[6] http://www.oebb.at/en/Travelling_abroad/Eurail_Austria_Pass/index.jsp (last visited June 25, 2015).

[7] http://www.railpass.com/about-us (last visited June 25, 2015).

Sachs left for Austria the next month. Pet. App. 5a-6a. From Innsbruck, she planned to catch an OBB train bound for Prague. Given the long ride, Sachs asked OBB to upgrade her ticket from an unassigned seat to a reserved couchette bed. OBB accepted her request for an additional fee at the station. *Id.*

From there, Sachs walked to the platform to catch her train. Pet. App. 6a. But while attempting to board, the train began to move. She fell onto the tracks. The moving train crushed her legs, forcing doctors to amputate both above the knee. *Id.*

B. Procedural History

1. Sachs sued OBB in the United States District Court for the Northern District of California, asserting five claims: negligence, design defects, failure to warn, and breaches of implied warranty of merchantability and fitness. Pet. App. 6a. She argued that OBB is subject to suit under Clause One of the FSIA's commercial activity exception because OBB, through its subagent RPE, "carried on" commercial activity in the United States, and her lawsuit is based upon that activity. *Id.* 104a-05a; *see* 28 U.S.C. § 1605(a)(2).

OBB moved to dismiss, arguing that it is entitled to sovereign immunity because Clause One does not apply here. Pet. App. 7a, 102a. In the alternative, OBB also argued that Sachs's claims should be dismissed for lack of personal jurisdiction, *forum non conveniens*, and international comity. *Id.*

Without reaching any of OBB's alternative arguments, the district court granted OBB's motion on sovereign immunity grounds. Pet. App. 101a. The district court recognized that foreign states may act

through agents, and it did not dispute that RPE was an agent of OBB under the common-law test. *Id.* 105a-06a. But the district court reasoned that an entity cannot be an agent of a foreign state under Clause One unless the entity is an alter-ego of the foreign state – as defined by *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611 (1983) – and RPE is not an alter-ego of OBB. Pet. App. 107a-09a.

2. A divided panel of the Ninth Circuit agreed with the district court's judgment but could not settle on a rationale for affirming it. Adopting the district court's reasoning, Judge Tallman agreed that the ticket sale could not be attributed to OBB. Pet. App. 77a. Judge Bea, by contrast, "assume[ed] *arguendo* that an agency relationship exists" between OBB and RPE. *Id.* 85a. He concluded, however, that Sachs's suit was not "based upon" the commercial activity OBB carried on in the United States because the allegedly negligent acts and omissions at issue here "took place in Austria." *Id.* 86a-87a.

Judge Gould voted to reverse the district court. Pet. App. 90a. He reasoned that (a) common-law agency principles, not *Bancec*'s alter-ego test, control whether a foreign state carries on commercial activity under Clause One, (b) Sachs's lawsuit is "based upon" OBB's commercial activity, and (c) that activity has "substantial contact" with the United States," thereby satisfying Clause One's final requirement. *Id.* 92a, 95a-96a, 98a-99a. He also noted that the only two other courts of appeals to consider similar cases had likewise concluded that "where a foreign common carrier, operated by a sovereign entity, purposefully sells tickets for use of

the carrier's services overseas through a domestic sales agent, the ticket sale is commercial activity which may be imputed to the foreign common carrier and is sufficient to invoke the commercial activity exception." *Id.* 92a-94a (citing *Kirkham v. Societe Air Fr.*, 429 F.3d 288 (D.C. Cir. 2005); *Barkanic v. General Admin. of Civil Aviation of China*, 822 F.2d 11 (2d Cir. 1987)).

3. On rehearing en banc, the court of appeals reversed by an 8-3 vote, adopting Judge Gould's reasoning and the views of the Second and D.C. Circuits. Pet. App. 1a, 41a-42a.

The en banc court first held that common-law agency principles control whether a foreign state "carrie[s] on" commercial activity in the United States for purposes of the FSIA. Pet. App. 15a. Put another way, when a foreign state "engage[s] in commerce in the United States indirectly by acting through its agents or subagents," Clause One denies sovereign immunity. *Id.* And applying those common-law principles, the court explained that when "a common carrier authorizes a travel intermediary to 'issue tickets on its behalf and to collect and hold customer payment, the intermediary acts as the [carrier's] agent.'" *Id.* 18a (alteration in original) (quoting Restatement (Third) of Agency § 3.14 cmt. c (2006)).

Second, the court of appeals held that Sachs's action was "based upon" commercial activity because "an element" of each of her claims arose from OBB's sale of Sachs' ticket. Pet. App. 33a-36a (emphasis omitted) (quoting *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000)). With respect to her negligence claim, the ticket sale formed a "common-

carrier/passenger relationship" between Sachs and OBB, giving rise under the applicable substantive law (California law, *id.* 34a n.14) to OBB's "duty of utmost care." *Id.* 34a. Similarly, the court of appeals reasoned that a "transaction between a seller and a consumer" was "a necessary prerequisite to proving" her other state-law claims for design defects, failure to warn, and breaches of implied warranties. *Id.* 38a-39a (citing Restatement (Second) of Torts § 402A (1965)).

Third, the court of appeals held that OBB's railway enterprise had "substantial contact" with the United States because it involved the regular "marketing, selling, and arranging of foreign travel in the United States." Pet. App. 32a.

Judge O'Scannlain dissented, arguing that "the standard announced in *Bancec*" should control whether an entity is an agent of a foreign state. Pet. App. 51a-53a.

In a separate dissent, then-Chief Judge Kozinski agreed with Judge O'Scannlain that RPE's ticket sale should not be attributed to OBB. Pet. App. 61a. He also maintained that all of Sachs's claims failed Clause One's "based upon" requirement because "[t]he injury and any negligence occurred in Austria." *Id.* 62a, 65a.

4. In this Court, OBB challenges the first two holdings of the court of appeals. It asks this Court to decide (i) whether common-law agency principles determine whether a foreign state carries on commercial activity and (ii) if so, whether Sachs's action is "based upon" OBB's commercial activity. Pet. i. OBB does not challenge the Ninth Circuit's "substantial contact" holding. *Id.*

SUMMARY OF ARGUMENT

Neither of OBB's arguments undercut the court of appeals' holding that Clause One of the FSIA's commercial activity exception denies sovereign immunity in this case.

I. Common-law agency principles control whether a foreign state "carried on" commercial activity in the United States. Foreign states, just like private corporations, can act only through agents. And the FSIA is designed to treat foreign states the same as private actors when they enter the commercial marketplace. That means attributing the acts of common-law agents to foreign states, just as to ordinary businesses.

OBB's alternative proposals misconstrue the FSIA and would produce intolerable results. OBB argues that the FSIA's definition of "foreign state" should control the attribution question here. But that definition determines which entities are eligible for sovereign immunity, not which entities may act as an agent of a foreign state. OBB also contends that the "alter ego" test from *Nat'l City Bank v. Banco para el Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611 (1983), should control. But this argument ignores the fact that *Bancec* governs attribution arising from relations between foreign states and their corporate subsidiaries, not from entirely distinct entities performing specific tasks on behalf of foreign states. Were the law otherwise, foreign states conducting business in the United States could evade jurisdiction simply by acting through third-party agents, destroying the symmetry that the FSIA seeks to create between private actors engaged in

commercial entities and foreign states engaged in such activities.

II. Sachs's action is "based upon" a commercial activity – namely, OBB's railway enterprise – that has substantial contact with the United States. The term "activity" in Clause One – in contrast to the term "act" used in Clauses Two and Three – directs courts to conduct the "based upon" inquiry against the overall course of the defendant's business, not any particular acts. That being so, it does not matter here whether the phrase "based upon" refers to the "gravamen" or at least one element of an action. Sachs's action is based *entirely* upon OBB's commercial activity of running a commercial railway. Her action is thus the inverse of *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), where none of the elements of the plaintiffs' action arose from commercial activity; instead, they all derived from sovereign conduct.

Insofar as OBB suggests that the statute's "based upon" requirement requires not only a sufficient nexus to commercial (as opposed to sovereign) activity but also a geographic tie to an act occurring in this country, OBB is mistaken. Clause One's "substantial contact" requirement does that work. And OBB does not challenge the court of appeals' holding that OBB's commercial railway business has substantial contact with the United States.

Even if OBB and the United States were correct that the phrase "based upon" requires a geographic tie to an act occurring in this country, Sachs would still prevail. The phrase "based upon" covers everything from matters based partly on an act to matters based entirely upon an act. Faced with this

indeterminacy, the easily administrable "one element" test would be far superior to the nebulous "gravamen" test. This Court has long stressed that tests to implement jurisdictional statutes should be as simple as possible, avoiding vague, multifactor tests whenever possible. The gravamen test would introduce profound uncertainty into the FSIA, with no significant offsetting benefit.

OBB's argument that Sachs's claims fail the one-element test is not properly before this Court because OBB never advanced this argument in its petition for certiorari. In any event, OBB's argument is unavailing. This Court defers to lower courts on matters of state law, and nothing about the Ninth Circuit's application of California law warrants departure from that presumption of correctness.

ARGUMENT

I. Common-Law Agency Principles Control Whether A Foreign State "Carries On" Commercial Activity In The United States.

Every court of appeals to address the issue – eight in total – has held that the acts of common-law agents should be attributed to a foreign state for assessing jurisdiction under the FSIA's commercial activity exception.[8] The United States concurs, as

[8] *See Mar. Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1005 (D.C. Cir. 1982); *First Fid. Bank, N.A. v. Gov't of Antigua & Barbuda-Permanent Mission*, 877 F.2d 189, 193-94 (2d Cir. 1989); *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398-400 (4th Cir. 2004); *Dale v. Colagiovanni*, 443 F.3d 425, 428-29 (5th Cir. 2006); *BP Chems. Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677, 687-88 (8th Cir. 2002); *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 996 (10th Cir. 2007); *Nelson*

has every Justice of this Court to consider the question. *See* U.S. Br. 9-19; *Saudi Arabia v. Nelson*, 507 U.S. 349, 372-73 (1993) (Kennedy, J., joined by Blackmun and Stevens, JJ., concurring in part and dissenting in part). That consensus is correct.

A. Common-Law Agency Principles Implement The Text And Purposes Of The FSIA.

1. *Text.* Clause One of the commercial activity exception provides that foreign states are subject to jurisdiction in United States courts when the plaintiff's action is based upon commercial activity "carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). The statutory phrase "carried on" necessarily incorporates general common-law agency principles. Like a corporation, a foreign state can act "only through its agents." *Daimler AG v. Bauman*, 134 S. Ct. 746, 759 n.13 (2014) (quoting 1 William Fletcher, *Cyclopedia of the Law of Corporations* § 30 (Supp. 2012-2013)); *see also Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (personal jurisdiction depends on the "activities of the corporation's agent[s] within the state"). And "[f]oreign states, like private actors, often engage in commercial activities by employing entities under their control to enter into and execute transactions." U.S Br. 10-11. Congress, therefore, would have expected that courts would use traditional agency principles to determine whether a foreign state "carried on" commercial activity.

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v. Saudi Arabia, 923 F.2d 1528, 1533 (11th Cir. 1991), *rev'd on other grounds*, 507 U.S. 349 (1993). OBB's assertion (Petr. Br. 52) that the Fifth and D.C. Circuits have held to the contrary is incorrect. *See* U.S. Br. 13 & n.3.

Indeed, "where a common-law principle is well established . . . the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (citations omitted). The principle that juridical entities act through traditional agents is well established. *See, e.g., Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1191 (2011) ("[W]e consult general principles of law, agency law, which form the background against which federal tort laws are enacted."). And nothing in the text of the FSIA evinces an intent to dispense with that common-law principle.

OBB protests, however, the FSIA itself – "and not the pre-existing common law" – exclusively "governs the determination of whether a foreign state is entitled to sovereign immunity." Petr. Br. 25-26 (citing *Samantar v. Yousuf*, 560 U.S. 305, 312 (2010)). But this rule simply means that a plaintiff must invoke a *statutory* exception to defeat sovereign immunity; a common-law theory will not do. *See id.*; *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-39 (1989). Once a plaintiff invokes a statutory exception (as Sachs has done here, with respect to the commercial activity exception), this Court has made clear that common-law principles inform the meaning of the FSIA exception at issue. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 473-78 (2003) (relying on "elementary principles of corporate law" to construe the FSIA); *Nat'l City Bank v. Banco para el Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611, 621-23, 628-30 (1983) (looking to general sources summarizing common-law principles to determine

whether Cuba's national bank was the "alter ego" of the state for purposes of the FSIA).

2. *Purpose.* Applying common-law agency principles to resolve attribution disputes furthers the FSIA's purposes. The FSIA is designed to treat foreign states like private actors when such states operate as "every day participants" in the marketplace. H.R. Rep. No. 94-1487, at 7 (1976); *see also Nelson*, 507 U.S. at 360 (explaining that a foreign state is not immune "where it acts 'in a manner of a private player within' the market" (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992))). Many commercial industries "make frequent use of nonemployee agents to communicate with customers and enter into contracts that bind the customer and a vendor." Restatement (Third) of Agency § 1.01 cmt. c (2006); *see also* U.S. Br. 10. When foreign states use these kinds of agents in this manner, attributing the agents' actions to the states ensures that all commercial actors in this country are treated alike.

Any other rule would produce intolerable results. If conduct of third-party agents could not be attributed to foreign states, then "foreign states engaging in commercial activity in the United States [could always] shield themselves from any exposure to litigation in U.S. courts by the expedient of acting through" U.S.-based common-law agents. U.S. Br. 16. Put another way, a savvy foreign state could foreclose any jurisdiction over its commercial activities in this country simply by conducting all business here through contractors not "owned by [the foreign state]," Petr. Br. 43. This would eviscerate the FSIA's goal of providing American citizens with

"normal legal redress" against foreign states who engage in ordinary commercial transactions. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong., 2d Sess. 24 (1976) (statement of Monroe Leigh, Legal Adviser, State Department)); *see also* Pet. App. 25a-27a (noting that OBB's argument "would mean that scores of state-owned railroads and airlines worldwide" could evade jurisdiction in this country).

OBB offers no answer to this observation. *See* Petr. Br. 60. Instead, OBB merely notes that the FSIA values "uniformity" and complains that common-law agency principles can vary from state to state. *Id.* 59. But this complaint misses the mark. When construing other federal statutes, this Court has consistently held that "the general common law of agency, rather than the law of any particular State" controls. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 754-55 (1998) (citation omitted) (Title VII); *see also Meyer v. Holley*, 537 U.S. 280, 285-86 (2003) (using "traditional" agency principles to construe Fair Housing Act). And when construing other provisions of the FSIA, this Court has looked to general sources summarizing common-law principles. *See Dole Food*, 538 U.S. at 474-75 (looking to "basic tenet[s] of American corporate law" to assess ownership issue); *Bancec*, 462 U.S. at 621-23, 628-30 (looking to Restatements and other "general" sources to assess corporate "alter ego" issue). This Court can and should follow the same approach here, consulting "basic tenets of agency law to resolve Section 1605(a)(2) 'carried on' questions." U.S. Br. 18.

B. Neither Of OBB's Alternative Proposals For Identifying Principal-Agent Relationships Withstands Scrutiny.

OBB does not seriously contest that RPE's relationship with it satisfied the common-law test for a principal-agent relationship.[9] OBB maintains, however, that using common-law principles to resolve attribution questions under the FSIA runs afoul of either (1) the FSIA's definition of the term "foreign state"; or (2) this Court's decision in *Bancec*. Neither contention has merit.

1. The FSIA defines the term "foreign state" to include "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). The Act defines the phrase "agency or instrumentality of a foreign state," in turn, to cover only entities that are organs of foreign states or are owned by such states. *See* 28

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[9] This Court should ignore OBB's vague suggestion that RPE may not have been OBB's common-law agent. *see* Petr. Br. 55-56. "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." U.S. Sup. Ct. R. 14.1(a); *see also West v. Gibson*, 527 U.S. 212, 223 (1999) (declining to consider "matters fall[ing] outside the scope of the question presented"). And the first question presented asks this Court to resolve only whether the common-law agency test applies, not whether that test is satisfied here. *See* Pet. i.

At any rate, travel agents and other intermediaries that sell tickets on behalf of common carriers are agents of those carriers under basic principles of agency law. *See* Restatement (Third) of Agency, 3.14 cmt. c (2006). And even if they were not, OBB ratified RPE's authority, thus rendering RPE an agent, when OBB honored Sachs's Eurail pass and allowed her to pay only a difference in fare to upgrade her ticket. *See* Pet. App. 6, 19a n.6.

U.S.C. § 1603(b). From these definitions, OBB argues that any U.S.-based entity that does not constitute an "agency or instrumentality" under the FSIA cannot constitute an agent whose actions may be attributed to a foreign state.

This argument misreads the FSIA and makes no sense.

a. The FSIA's definition of "foreign state" concerns which kinds of entities are the embodiment of the state for purposes of being able to claim sovereign immunity. *See* H.R. Rep. No. 94-1487, at 15 (1976) (noting that "agency and instrumentality" definitions under Section 1603(b) determine which entities would be "entitled to sovereign immunity in any case before a Federal or State court"). If, for example, Sachs were suing RPE for her injuries, and in response RPE argued that it was part of the Austrian government and thus immune under the FSIA, a court would consult the definition of "agency or instrumentality" in Section 1603(b) to evaluate that argument. *See* Restatement (Second) of the Foreign Relations Law of the United States § 66 (1965).

Here, by contrast, the question is whether the actions of RPE can be attributed to OBB – undisputedly "an agency or instrumentality" of the Republic of Austria, Pet. App. 13a – for purposes of satisfying the commercial activity exception's requirement that a foreign state "carr[y] on" a commercial activity in the United States. That attribution question turns not on whether the defendant is an embodiment of a foreign state, but rather on whether a principal-agent relationship exists. *See supra* at 13-14.

That the attribution issue here turns on the statutory phrase "carried on," not the definition of the term "foreign state," answers Judge O'Scannlain's dissenting contention that the term "foreign state" must mean the same thing "throughout the [FSIA]." Pet. App. 47a-49a. The term "foreign state" does mean the same thing (namely, a state itself or an "agency or instrumentality") throughout the statute. But the question here is whether a foreign state has "carried on" commercial activity in the United States. Common-law agency principles determine that question.[10]

The same confusion lies beneath OBB's reliance (Petr. Br. 47) upon the "international law" principles recited in Section 66 of the Restatement (Second) of Foreign Relations Law. An entity must be an "agency or instrumentality" of a foreign state to claim sovereign immunity, but an entity need not be an "agency" of a foreign state to be an "agent" of such a state – that is, for its conduct to be attributed to the state. *See* Restatement (Second) of Foreign Relations Law § 169 (Am. Law Inst. 1965) (acts of an "individual agent" may be attributed to the foreign state).

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[10] That the operative statutory phrase here is "carried on," not "foreign state," likewise disposes of Judge O'Scannlain's assertion (Pet. App. 49a-51a) that the court of appeals' holding renders the word "agent" superfluous in 28 U.S.C. § 1605A(c). That provision creates a cause of action against "[a] foreign state" or "any official, employee, or agent of that foreign state" that is a state sponsor of terrorism. Under the Ninth Circuit's holding, the term "foreign state" in the provision includes agencies or instrumentalities, and the term "agent" means common-law agents. Under OBB's view, however, the term "agent" is superfluous because the term "foreign state" controls the question whether an entity is an agent.

b. Ordinary usage reinforces that the question whether an entity is an "agency" (and therefore a "foreign state") under Section 1603(b) is completely different from whether it is an "agent" for purposes of the FSIA's "carried on" requirement. An "agency" is an arm of a government, *see, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2491 (2014), while an "agent" is a person or entity acting on behalf of another. To be sure, the two terms share a common root. But it is hardly uncommon for two words with the same root to have significantly different meanings. *See FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1182 (2011) (explaining in statutory construction case that the word "person" means something quite different from "personal," and providing other similar examples).

Indeed, in all of its possible definitions for "agency," Black's Law Dictionary never provides that an entity to which authority is delegated may be called an "agency." *See* Black's Law Dictionary 74 (10th ed. 2014). Rather, such an entity is described by the term "agent." *See* Black's Law Dictionary 75 (10th ed. 2014) (defining "agent" as "[s]omeone who is authorized to act for or in place of another; a representative"). And that is the only term that matters here.

c. Treating the statutory definitions of "foreign state" and "agency" as controlling the attribution question here would create still other problems. The FSIA's definition of "agency" *excludes* any entity that is "a citizen of a State of the United States as defined in [28 U.S.C. § 1332(c) & (d)], []or created under the laws of any third country." 28 U.S.C. § 1603(b)(3). A commercial entity is a citizen of a U.S. State under Section 1332(c)(1) (the diversity jurisdiction statute)

when it is incorporated or has its nerve center there. *See Hertz Corp. v. Friend*, 559 U.S. 77, 80-81 (2010). That means that if OBB is correct that the FSIA's definition of "agency" controls when an entity's acts may be imputed to a foreign state for purposes of satisfying the commercial activity exception, the *more* tightly connected an entity is to the United States, the *less* likely it would be to be an agent for imputation purposes. If a foreign state engages in commercial activity in the United States by means of a foreign-based instrumentality, it would be subject to U.S. jurisdiction. But if it establishes a subsidiary in the United States to conduct its business, it would not. That would turn the FSIA on its head.

More generally, OBB cannot be right that foreign states that engage in commerce may escape U.S. jurisdiction when involved in principal-agent relationships that would render private businesses accountable. As the State Department has explained: "When the foreign state enters the marketplace or when it acts as a private party, there is *no justification* in modern international law for allowing the foreign state to avoid the economic costs of the accidents which it may cause. . . . The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong., 2d Sess. 27 (1976) (statement of Monroe Leigh, Legal Adviser, State Department) (emphasis added). It is thus implausible that the FSIA allows foreign states to avoid commercial obligations that private parties may not, when the

purpose of the statute's commercial activity exception is to treat foreign states engaged in commercial activity the same as private businesses.

2. Petitioner's fallback argument – that *Bancec* should control all attribution questions involving the FSIA's "carried on" requirement – fares no better. In *Bancec*, the Court held that an instrumentality's actions can be imputed to the foreign state when the instrumentality is "so extensively controlled" by the state that the two entities are really one. 462 U.S. at 629. In that circumstance, the instrumentality is an "alter ego" of the foreign state, thus rendering it fair to hold the foreign state liable for the instrumentality's actions.

Bancec is mildly "instructive" here because it involved a question of imputation under the FSIA, Petr. Br. 52, and this Court looked to common-law principles to resolve that question, *see* 462 U.S. at 621-23, 628-30. But as the court of appeals recognized here, *Bancec* does not directly apply because that case dealt with piercing the veil of a foreign state's "corporate affiliates," not determining whether actions of "entirely distinct" entities can be attributed to foreign states for jurisdictional purposes. Pet. App. 20a-21a; *see also* U.S. Br. 17-18. The latter situation involves different considerations and turns on a less stringent test. *See Dale v. Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006) (inquiry as to third parties is "analytically distinct" from *Bancec*); Restatement (Third) of Agency, Introduction, at 4 (Am. Law Inst. 2006) (distinguishing among different types of principal-agent relationships).

Dissenting below, Judge O'Scannlain argued that if actions of corporate affiliates are not imputed to foreign states unless the affiliates are extensively controlled by the states, it makes no sense for the actions of entirely distinct entities to be attributable to foreign states under less stringent conditions of the common-law. Pet. App. 53a-54a. But this dichotomy makes perfect sense. An alter-ego situation creates a principal-agent relationship "for *all* purposes." U.S. Br. 17. It also exposes the principal to substantive liability for all of the agent's actions. A "traditional agent," by contrast, exposes its principal to jurisdiction only for those "*particular*" actions that it is specifically authorized by the principal to perform. *Id.*; *see also* Br. for the United States as Amicus Curiae Supporting Petr. at 30, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (No. 11-965); Restatement (Third) of Agency, Introduction, at 4 (Am. Law Inst. 2006). It thus is completely natural that the test for the former would be more demanding than the latter.

II. Sachs's Suit Is "Based Upon" Commercial Activity Carried On In The United States.

Clause One of the FSIA's commercial activity exception denies sovereign immunity for any lawsuit "based upon a commercial activity" that has "substantial contact with the United States." 28 U.S.C. §§ 1603(e), 1605(a)(2); *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 356 (1993) (Under Clause One, the "action must be 'based upon' some 'commercial activity' by [the foreign state] that had 'substantial contact' with the United States."). OBB does not challenge the Ninth Circuit's holdings that its railway enterprise is a commercial activity having

substantial contact with the United States, Pet. App. 31a-32a. *See* Pet. i. But OBB contends that Sachs's lawsuit is not "based upon" that activity, *see* Petr. Br. i, because the acts constituting "the gravamen of the complaint" occurred outside the United States, *id.* at 29.

OBB is mistaken. Sachs's action easily satisfies the "based upon" requirement in Clause One because it is based *entirely* upon a commercial "activity" that has substantial contact with the United States – namely, OBB's railway enterprise. But even if OBB were correct that Sachs must show that her action is "based upon" a particular "act" occurring in this country, she would meet that requirement because the phrase "based upon" would be best understood to require that the act supply one element of the action.

A. Sachs's Injuries Arise Entirely From A Commercial "Activity" – Operating A Railway Business – That Has Substantial Contact With The United States.

1. *Text.* Regardless of the precise meaning of "based upon," the term "activity" in Clause One directs courts to focus on OBB's overall commercial railway enterprise, not just on any specific commercial "act." Clause One therefore applies here because OBB's railway enterprise is the basis for *all* of the allegations comprising Sachs's action.

a. In contrast to Clauses Two and Three, which require a plaintiff's action to be "based upon *an act*" having a requisite connection to the United States, Clause One requires a plaintiff's action to be "based upon *a commercial activity*" having such a connection. 28 U.S.C. § 1605(a)(2) (emphasis added).

And the FSIA makes clear that the word "activity" is more inclusive than "act." The statute defines "commercial activity" as not just "a particular transaction or act" but also "a regular course of commercial conduct." *Id.* § 1603(d). This reference to a "course of conduct" requires courts to consider not just any discrete act, but the totality of the commercial conduct involved. Thus, a lawsuit satisfies Clause One's "based upon" requirement if it is founded on a regular course of commercial conduct having substantial contact with the United States.

The ordinary meaning of both "activity" and "commercial activity" reinforce this understanding. "Activity" means the "*collective acts* of one person or of two or more people engaged in a common enterprise." *Black's Law Dictionary* 41 (10th ed. 2014) (emphasis added); *see also The Oxford English Dictionary* (3d ed. 2010) (defining "activity" as "an occupation, a pursuit"). For instance, playing baseball is an activity. Throwing a pitch, taking a swing, and running to first base are discrete "acts" that comprise that "activity." In turn, *Black's Law Dictionary* defines "commercial activity" as an "activity, such as operating a business, conducted to make a profit." *Id.* at 41. Operating a bakery, then, is a commercial activity comprised of acts like taking an order for a cake and baking that cake.

Clause One's reference to activity "carried on" by the foreign state confirms that the term "activity" encompasses a broader range of conduct than a single "act." "Carry on" means "practi[c]e continually or habitually," "conduct," or "manage." *The Oxford English Dictionary* (3d ed. 2010) (defining "to carry on"); *see also id.* (defining to "carry" as "[t]o conduct

(a business). Now usually *to carry on*."). "Carried on" thus denotes a course of conduct, not a specific deed. An "activity," in short, is "carried on," 28 U.S.C. § 1605(a)(2) cl. 1, while an "act" is "performed," *id.* cl. 2.

No other understanding of the word "activity" would synthesize Clause One with its neighboring two clauses. This Court has repeatedly recognized that a "textual difference between simultaneously enacted provisions that address the same subject makes no sense unless Congress meant different things by its different usage." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 357 (2005); *accord Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003). Had Congress wanted to require that suits under Clause One also be based upon a particular "act" occurring in the United States, it would not have used that word only in Clauses Two and Three.

Indeed, this Court has already treated the terms "act" and "activity" as meaning different things under the FSIA and other jurisdictional statutes. In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), the Court held that a decree rescheduling maturity dates on government bonds was an "act" under Clause Three with a direct effect in the United States. *Id.* at 618-19. But when addressing the Clause's additional requirement that the relevant act be connected to "commercial activity," the Court looked more broadly to the government bond program as a whole. *Id.* at 612. This Court likewise has repeatedly held that the word "activity" for purposes of determining maritime jurisdiction "is defined not

by the particular circumstances of the incident, but by the general conduct from which the incident arose." *Sisson v. Ruby*, 497 U.S. 358, 365 (1990) (citing cases). "In *Executive Jet* [*Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972)], for example, the relevant activity was not a plane sinking in Lake Erie, but air travel generally." *Sisson*, 497 U.S. at 365.

Applying the phrase "commercial activity" to this case is straightforward. The phrase refers to OBB's commercial railway business that gave rise to Sachs's suit. In fact, the legislative history of the FSIA contemplates lawsuits just like this one, explaining that "commercial activity" "includ[es] a broad spectrum of endeavor," including, for instance, "the carrying on of a commercial enterprise such as . an airline." H.R. Rep. No. 94-1487, at 16 (1976). Like running an airline, running a railway is a commercial activity. And selling a train ticket and operating a train are part and parcel of that commercial activity.

b. OBB and the Government ignore the word "activity," jumping instead straight to the question of what "based upon" means. *See* Petr. Br. 28; U.S. Br. 19. But once one properly focuses on the overall commercial activity involved, the precise meaning of "based upon" is irrelevant here. Sachs's suit satisfies Clause One regardless of whether "based upon" refers to the "gravamen" of the suit or at least one element of it, because *all* of the elements of her suit arise from OBB's railway business.

This case is thus the inverse of *Nelson*. In that case, *none* of the elements of the plaintiffs' action were based upon commercial activity. *See* 507 U.S. at 358 n.4. The plaintiffs alleged that Saudi police

wrongfully imprisoned and tortured an American employee of a Saudi government-run hospital. *Id.* at 352-53. Even though "arguably commercial activities" – namely, running a hospital – "led to the conduct that eventually injured" the employee, the complaint rested only on the exercise of police power, an activity "peculiarly sovereign in nature." *Id.* at 358. The action was therefore based "entirely upon" sovereign, not commercial, activity. *Id.* at 358 n.4.

There are, of course, closer cases in which some elements of a claim arise from commercial activity but others arise from sovereign conduct – and that is where the precise definition of "based upon" has bite. The Fifth Circuit developed its gravamen test to deal with that situation – that is, to determine whether the challenged conduct "was commercial rather than sovereign." *Walter Fuller Aircraft Servs. v. Republic of the Philippines*, 965 F.2d 1375, 1386 (5th Cir. 1992) (applying *Callejo v. Bancomer*, 764 F.2d 1101, 1109 (5th Cir. 1985)).

But even if the gravamen test were the correct way to assess that question, it would not matter here. Sachs's suit has nothing to do with any sovereign activity. It is based *entirely* upon a commercial activity: OBB's railway business.

c. The Solicitor General notes (and OBB seems to assume) that Clause One also "calls for a tie to the United States" and maintains that the phrase "based upon" must keep that tie from being too "attenuate[d]." U.S. Br. 24; *see also id.* (the phrase "based upon" "ensures a meaningful linkage between the United States and an action"); Pet. App. 66a (Kozinski, C.J., dissenting) (assuming that the "based upon" requirement demands a "sufficient nexus"

between this country and the plaintiff's action). The Solicitor General is correct that Clause One calls for a geographic foothold in the United States. But as this Court indicated in *Nelson*, the "substantial contact" requirement 28 U.S.C. § 1603(e) – rather than the phrase "based upon" – does that work. *See Nelson*, 507 U.S. at 356 (treating "based upon" requirement as distinct from question whether the activity at issue had "substantial contact with the United States"); *Callejo*, 765 F.2d at 1108-12 (analyzing two issues separately); *Globe Nuclear Servs. & Supply Ltd. (GNSS) v. AO Techsnabexport*, 376 F.3d 282, 286-88, 291-92 (4th Cir. 2004) (Luttig, J.) (same).

Under the "substantial contact" requirement, the commercial activity must occur "in whole or in part in the United States." H.R. Rep. No. 94-1487, at 12 (1976). That is, while particular conduct giving rise to the lawsuit may "occur[] outside of the United States," a meaningful aspect of the commercial activity as a whole must take place inside this country. 15-104 *Moore's Federal Practice Civil* § 104.12 (LexisNexis 2015). Accordingly, there is no need to shoehorn a geographic nexus requirement into the phrase "based upon." Not only would this import content into the phrase that finds no grounding in its words, but the statute's "substantial contact" requirement would become superfluous. This consequence would be inconsistent with this Court's longstanding obligation to "give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

Here, the court of appeals held that OBB's railway business has "'substantial contact' with the

United States." *See* Pet. App. 31a-32a (quoting 28 U.S.C. § 1603(e)). The court of appeals explained that OBB (though its agents) reaches out to U.S. customers and attracts thousands of them each year to ride its trains in Austria by marketing and selling Eurail passes, *id.* – a product not available to Austrian residents.

OBB has not challenged that holding; indeed, OBB's petition for a writ of certiorari never once mentions the phrase "substantial contact." So this Court must assume that the requirement is met here.

2. *Structure.* The structure of Section 1605(a)(2) confirms that Clause One does not require a lawsuit to be based upon a particular wrongful act in the United States, so long as it is based upon business activity that is regularly conducted in part in this country. Only Clause Two's text requires an "act" on U.S. soil. *Id.*

This contrast between Clauses One and Two makes sense. Unlike Clause Two, where the commercial activity involved can occur entirely outside the United States, Clause One requires that the commercial activity have substantial contact with the United States. Therefore, Clause One already requires a tighter connection than the other clauses between commercial activity and the United States – and a tighter connection between the lawsuit and the commercial activity. *Nelson*, 507 U.S. at 357-58; U.S. Br. 22-23. The lawsuit need not also involve a particular act in the United States.

Recognizing the difference between Clauses One and Two also gives each an independent meaning. Clause Two applies when a particular act – even if noncommercial – occurs in the United States but is

connected to a commercial course of conduct abroad (for instance, roughing up a business executive in the United States in connection with a contentious contract negotiation abroad). Clause One, on the other hand, applies when a state conducts commercial activity having substantial contact with the United States and causes an injury *in the course of that activity.*

Importing Clause Two's discrete-U.S.-act requirement into Clause One, as OBB and the Government would have it, would also lead to absurd results. For instance, consider a slight variation on the facts of *Weltover.* In that case, a decree rescheduling debts occurred in Argentina ("an act outside the territory of the United States") in connection with a bond program abroad ("a commercial activity of the foreign state elsewhere"). 504 U.S. at 609-12; 28 U.S.C. § 1605(a)(2). That act denied funds to New York bank accounts ("a direct effect in the United States"). *Weltover*, 504 U.S. at 618-19; 28 U.S.C. § 1605(a)(2). Clause Three therefore conferred jurisdiction. *Weltover*, 504 U.S. at 620. Keeping all else the same, but moving the bond program (the commercial activity) to the United States, however, would trigger Clause One, not Clause Three, because the latter applies only where the commercial activity takes place outside the United States.

But OBB's reading would preclude jurisdiction under Clause One because the defendant's particular wrongful act occurred abroad. Thus, under OBB's reading, a *closer* nexus to the United States would destroy jurisdiction.

3. *Purpose.* Looking under Clause One to the overall course of commercial conduct giving rise to a lawsuit accords with the purpose of the FSIA. The statute's commercial activity exception is designed to treat foreign states like private actors for jurisdictional purposes when states "participat[e] in the marketplace in the manner of a private citizen or corporation." *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614 (1992); *accord Nelson*, 507 U.S. at 360. In fact, the FSIA's jurisdictional prerequisites are "patterned after" the District of Columbia long-arm statute. *See* H.R. Rep. No. 94-1487, at 13 (1976).

Providing jurisdiction over actions arising from for-profit enterprises that have substantial contact with the United States parallels the circumstances under which courts in Washington, D.C., may exercise personal jurisdiction over private businesses. The D.C. long-arm statute (now, as when the FSIA was enacted) confers jurisdiction over "a person, who acts directly or by an agent, as to a claim for relief arising from the person's *transacting any business*" in the forum. D.C. Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 132(a), title I, 84 Stat. 549 (current version at D.C. Code § 13-423 (2015)) (emphasis added). And the Due Process Clause permits the exercise of specific personal jurisdiction when a suit is "arising out of or related to the [defendant's] *activities* within the" forum. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 409 (1984) (emphasis added); *accord id.* at 414 & n.8. Either "activity [that] is 'continuous or systematic'" *or* "certain 'single or occasional acts'" can establish sufficient contacts with the forum. *Goodyear Dunlop Tires Operations, S.A.*

v. Brown, 131 S. Ct. 2846, 2853 (2011) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)).[11]

4. *Consequences.* Understanding Clause One to require only that a plaintiff's action be based upon commercial activity that has substantial contact with the United States – not upon a particular act that occurred in the United States – also achieves sensible outcomes.

a. As the Government has observed, "United States residents benefit from the availability of convenient domestic fora to obtain redress for injuries caused by foreign entities." U.S. Br. 28;

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[11] Even if, as the court of appeals suggested, Clause One's "substantial contact" provision somehow requires a closer nexus between activity and the forum than the "minimum contacts" test does, Pet. App. 31, it bears repeating that OBB has not challenged the court of appeals' "substantial contact" holding. And while OBB raised a due process objection to jurisdiction in the district court, the district court never ruled on that objection, *see* Pet. App. 101a-11a, and OBB does not press any such argument here.

At any rate, OBB's steady stream of sales to Americans, through U.S. agents, of a product customized for the overseas market, constitutes the sort of purposeful availment of the U.S. market that establishes jurisdiction in a U.S. court. *See J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011) (plurality opinion) (explaining that personal jurisdiction is appropriate where actions are "purposefully directed" at a forum); *id.* at 2792 (Breyer, J., concurring in the judgment) (explaining that a "regular course of sales" in a forum establishes minimum contacts (citation and internal quotation marks omitted)); *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cnty.*, 480 U.S. 102, 112 (1987) (plurality opinion) (explaining that "designing the product for the market in the forum State, advertising in the forum State, . . . or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State" all confirm purposeful availment).

Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011) (No. 10-76). This is particularly true where, as here, the plaintiff has suffered a physical injury making it extremely difficult – if not impossible – to travel abroad.

Moreover, it is reasonable for United States citizens to assume that when a foreign entity reaches into this country and offers a service – especially, as here, a service not available to that entity's local customers – that they will be able to vindicate their rights in U.S. courts. This assumption comports with the State Department's position when Congress was considering enacting the FSIA. As the State Department's representative explained, when foreign states conduct "ordinary commercial activity" in this country, the restrictive theory of sovereign immunity prevents American citizens from being "deprived of normal legal redress against foreign states." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong., 2d Sess. 24 (1976) (statement of Monroe Leigh, Legal Adviser, State Department).

OBB's reading of Clause One, on the other hand, would create untenable results. Not only could a closer nexus to the United States destroy jurisdiction – as illustrated in the *Weltover* variation discussed above, *see supra* at 31 – but contracts negotiated in the United States would often be unenforceable here. Consider a variation on the facts of *Nelson*. A foreign state-owned corporation regularly negotiates and signs employment contracts entirely in the United States, agreeing to hire American citizens to work as

engineers overseeing oil and gas production. But after one recruit arrives on foreign soil, the employer requires him to perform manual labor on oil rigs.[12]

In such a scenario, OBB's reading of Clause One would presumably render the Clause inoperable because the particular wrongful act giving rise to the action – changing the employee's job duties – occurred abroad. Clause Two would not apply for the same reason, and Clause Three would not apply because there would be no direct effect in the United States.

But a proper reading of Clause One would grant jurisdiction because the action is based upon the operation of an oil and gas business that recruits American employees, a commercial activity having substantial contact with the United States. And this is the correct result. Indeed, *Nelson* itself suggested that had the Nelsons "alleged breach of contract," a U.S. court may have had jurisdiction to hear those claims. 507 U.S. at 354, 358; *see also id.* at 370 (White, J., concurring in the judgment) (noting that the "signing of the employment contract in Miami . . may very well qualify as commercial activity in the United States").

b. Maintaining Clause One's focus on the commercial "activity" involved also leaves foreign states with ample means of protecting their own interests in litigating at home. Where it would be unfair to hale a foreign state into U.S. courts, states can invoke the doctrine of *forum non conveniens*.

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[12] Litigation against foreign states often arises in the context of contracts concerning development and extraction of natural resources. *See, e.g., SerVaas Inc. v. Republic of Iraq*, 2011 WL 454501 (2d Cir. 2011).

That doctrine permits a court to "resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a . statute." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). *Forum non conveniens* thus enables courts to "retain flexibility" in these types of cases to prevent unfair outcomes. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981).

Furthermore, foreign sovereigns doing business in the United States can contract with their customers to avoid litigating in undesirable fora. As the Government has observed, common carriers often include forum selection clauses in form ticket contracts; indeed, Eurail passes like the one Sachs purchased now include such a clause, requiring lawsuits to be brought in the state of the defendant carrier's residence. U.S. Cert. Br. 21-23; *see also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (upholding such a forum selection clause). So if an entity such as OBB wishes to avoid litigating in a U.S. court, it has ample ability to do so.[13]

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[13] Beyond forum-selection clauses, a number of treaties govern jurisdiction for common carriers. *E.g.*, Montreal Convention, May 28, 1999, 2242 U.N.T.S. 309 (airlines). This further underscores the rarity of situations in which state-owned common carries will be haled into U.S. courts against their will. *See* U.S. Cert. Br. 22 (arguing that it is "unlikely that suits similar to this one will arise with any frequency").

B. Even If Clause One Requires A Plaintiff's Action To Be Based Upon A Discrete "Act" On American Soil, That Act Need Be Only One Element Of Respondent's Action.

Even if this Court accepted OBB's invitation to disregard Clause One's text and to require that a plaintiff's action be based upon a discrete act occurring on U.S. soil, this case would still come out the same way. The phrase "based upon" is susceptible to multiple meanings, and this Court in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), had no need to choose among them. But every court of appeals to assume that the phrase requires a nexus between the plaintiff's lawsuit and an act occurring in this country has held that this requirement is satisfied when the act constitutes one element of the plaintiff's action. *See Kirkham v. Societe Air Fr.*, 429 F.3d 288, 292 (D.C. Cir. 2005); *Barkanic v. General Admin. of Civil Aviation of China*, 822 F.2d 11, 13 (2d Cir. 1987); *Santos v. Compagnie Nationale Air Fr.*, 934 F.2d 890, 893 (7th Cir. 1991); *BP Chems. Ltd.* v. *Jiangsu Sopo Corp.*, 285 F.3d 677, 682 (8th Cir.), *cert. denied*, 537 U.S. 942, 687 (2002); *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000); Pet. App. 33a (this case).[14] If this Court holds that the phrase "based upon" requires a geographical nexus, it should follow this consensus.

1. Addressing the phrase "based upon" in *Nelson*, this Court noted that the phrase refers to "those

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[14] As noted above, the Fifth Circuit uses its "gravamen" test to determine whether a lawsuit is based upon commercial as opposed to sovereign activity, not to perform any geographic nexus assessment. *See supra* at 28; *Callejo*, 764 F.2d at 1109.

elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. at 357. And this Court made clear that the "based upon" requirement does not demand that "each and every element of a claim" arise from commercial activity. *Id.* at 358 n.4. But because *none* of the elements of the plaintiffs' action arose from commercial activity, the Court did not specify how many elements are necessary for an action to be "based upon" certain conduct. *See id.*

OBB nonetheless asserts that *Nelson* "held that the based-upon inquiry should focus on the gravamen of the complaint." Petr. Br. 29. As support for this assertion, OBB quotes a parenthetical summary in *Nelson* of the Fifth Circuit's decision in *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985). The Government quotes the same language from the same parenthetical, followed simply by "citation omitted," and asserts that this language "indicates" this Court's endorsement of the gravamen test. U.S. Br. 20-21.

But even setting aside the fact that *Callejo* used the gravamen test to distinguish commercial from sovereign acts, not to perform any geographical nexus inquiry, this Court's reference to *Callejo* hardly embraced the "gravamen" test. *Callejo* was not the only case this Court cited as support for its instruction to look to "th[e] elements of a claim." 507 U.S. at 357. In the same string cite, this Court also cited a Seventh Circuit case, *Santos v. Compagnie Nationale Air France*, 934 F.2d 890. And that case held that "[i]f *one* of those elements consists of commercial activity within the United States or other conduct specified in the Act, this country's courts

have jurisdiction." *Id.* at 893 (emphasis added). What is more, the Seventh Circuit explained in *Santos* that Clause One is satisfied when "a foreign government or its agents sell a plane ticket or otherwise make travel arrangements in the United States (creating a duty of care in providing safe passage) even if the [passenger] was travelling only between foreign points at the time of the accident." *Id.* at 894 (citing *Barkanic*, 822 F.2d at 13).

To be clear: Sachs does not contend that *Nelson*'s reference to *Santos* adopted the "one element" test. But neither can OBB or the Government maintain that *Nelson*'s reference to *Callejo* adopted the gravamen test. The meaning of "based upon" remains an open question.

2. The phrase "based upon" – like the phrases "arising out of" or "stemming from" – describes the relationship between something and its constituent or precipitating factors. But the phrase does not describe that relationship with any specificity. The Solicitor General cites dictionary entries defining "base" as "the foundation or most important element." U.S. Br. 21 (quoting definition 2 of the term from one dictionary and definition 4.a from another). But "based upon" can refer to *any* necessary factor, not just the primary or most important one. *See Black's Law Dictionary* 192 (rev. 4th ed. 1968) (defining "based upon" as "an initial or starting point for calculation"); *Black's Law Dictionary* 180 (10th ed. 2014) (defining "basis" as "an underlying fact or condition"); *The Random House Dictionary of the English Language* 172 (1973) ("Base, basis, foundation refer to *anything* upon

which a structure is built and upon which it rests." (emphasis added)).

Common usage in the U.S. Code confirms that "based upon" has a range of possible meanings. Something can be "based entirely," "based primarily," or "based partly" upon something else. *See, e.g.*, 5 U.S.C. § 8467(c)(1) (referring to a claim "based in whole or in part upon the physical, sexual, or emotional abuse of a child"); 11 U.S.C. § 502(k)(1) (referring to "a claim filed under this section based in whole on an unsecured consumer debt"); 31 U.S.C. § 3730(d)(1) (referring to an "action" that "the court finds to be based primarily on" certain disclosures). Those statutory refinements of the phrase "based upon" would make no sense if the phrase necessarily meant the most important element. The phrase, when left unadorned, must encompass situations in which only one element is present.[15]

3. When the meaning of a jurisdictional statute such as the FSIA is indeterminate, this Court favors clear, bright-line rules. Therefore, to the extent that the meaning of "based upon" is ambiguous, the one-element test represents a far better method of

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[15] The Solicitor General contends that because Clauses Two and Three require lawsuits to be based upon "act[s] performed *in connection with* a commercial activity," 28 U.S.C. § 1605(a)(2) (emphasis added), the phrase "based upon" must mean "something more than a mere connection with, or relation to, commercial activity," U.S. Br. 22 (quoting *Nelson*, 507 U.S. at 357-58). Maybe so. But the "one element" test requires more than a mere connection or relationship; it requires that the commercial activity at issue supply one of the facts necessary for the success of the plaintiff's action. So the phrase "in connection with" provides no meaningful contrast here.

administering a geographic nexus requirement than does the vague gravamen test.

a. Time and again, this Court has stressed that "jurisdictional rules should be clear." *Lapides v. Bd. of Regents*, 535 U.S. 613, 621 (2002). Consequently, when choosing among possible constructions of a jurisdictional statute, this Court has long "place[d] primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible." *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010).

This approach to jurisdictional statutes benefits courts and litigants alike. "[C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz*, 559 U.S. at 94. This is especially true in the context of subject-matter jurisdiction. Courts have an independent obligation to assure themselves of such jurisdiction even if the parties have not raised the issue. 5B Wright et al., Federal Practice & Procedure Civil § 1350 (3d ed. 2013); *see also* Pet. App. 21a n.7 (noting OBB's failure here to make certain arguments). That being so, a "vague boundary" should be avoided "in the area of subject-matter jurisdiction wherever possible." *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment).

For litigants too, "[u]ncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful." *Grupo Dataflux v. Atlas Global Grp. L.P.*, 541 U.S. 567, 582 (2004). This is especially true with respect commercial actors. When "making business and investment decisions," such entities crave

"predictability" and certainty. *Hertz*, 559 U.S. at 94; *see also First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 621 (1983) (explaining "the need for certainty and predictability of result" for foreign states conducting commercial activity). Nebulous standards or multifactor tests cannot deliver such stability.

A few examples illustrate this Court's strong preference for clear rules to implement jurisdictional statutes. In *Hertz*, the Court had to decide, for purposes of the diversity jurisdiction statute, 28 U.S.C. § 1332, whether a business should be deemed to reside in its "nerve center" or where it conducts most of its business activities. 559 U.S. at 93. The former proposal typically requires knowledge only of the corporation's headquarters, while the latter turns on "general multifactor tests." *Id.* at 91. Even though the Court recognized that "seeming anomalies would arise" under the bright-line "nerve center" test, this Court – in a unanimous opinion by Justice Breyer – concluded that it "must accept them in view of the necessity of having a clearer rule." *Id.* at 96. "[O]ccasionally counterintuitive results is the price the legal system must pay to avoid overly complex jurisdictional administration while producing the benefits that accompany a more uniform legal system." *Id.*

Similarly, in *Grupo Dataflux*, this Court stuck to a bright-line rule for determining the citizenship of parties under the diversity-jurisdiction statute. Even though permitting "constant litigation" over diversity would have allowed courts to implement the statute with more precision, this Court held that the time of filing should always control whether diversity exists.

541 U.S. at 580-82. This straightforward rule "minimiz[es] litigation over jurisdiction." *Id.* at 581. Indeed, a time-of-filing rule also prevails in the context of the FSIA when determining corporate ownership. *See Dole Food*, 538 U.S. at 478.

Finally, in *Sisson*, this Court "eschew[ed] [a] fact-specific jurisdictional inquiry" for determining whether maritime jurisdiction exists under 28 U.S.C. § 1331(1). 497 U.S. at 364. Unanimously rejecting the defendant's argument that the question whether the incident has "a potentially disruptive impact on maritime commerce" should "turn on the particular facts of the incident" at issue, this Court held that the statute is satisfied whenever "the general features of the type of incident involved" demonstrate disruptive potential. *Id.* at 362-63. This Court indicated that "simpler jurisdictional formulae" should be rejected only when they "entirely divorce[] the jurisdictional inquiry from the purposes that support the exercise of jurisdiction." *Id.* at 364 n.2.

b. It is common ground between Sachs and the Solicitor General that, if the phrase "based upon" contains a geographical nexus requirement, "a single element of or fact necessary to a claim" can satisfy that requirement. U.S. Br. at 22. (OBB has not yet offered its view.) The question is thus whether this Court should adopt a "gravamen" test to try to further calibrate this requirement according to the specific facts of each individual case. Just as this Court has rejected similar arguments with respect to other jurisdictional statutes, it should reject OBB's and the Solicitor General's argument here.

i. OBB never explains exactly what it means by "gravamen." At one point in its brief, OBB equates

the term with "the alleged tortious conduct that injured the plaintiff." Petr. Br. 29. But this formulation fails to pinpoint any particular conduct within a tort action. And it fails to provide any guidance with respect to myriad other types of lawsuits. The Solicitor General, for his part, defines "gravamen" as the "gist or essence of a claim," U.S. Br. 21, thereby replacing one hazy term with two more.

Neither OBB nor the Solicitor General, therefore, offers any predictable formula for determining when an action is "based upon" commercial conduct that occurred on U.S. soil. Instead of looking merely at the elements of a plaintiff's claims, the gravamen test would require courts to concoct an approach for determining the "gist or essence" of the lawsuit, with no clear guideposts at hand.

Suppose, for example, that there is an accident on a direct flight from JFK to Vienna International Airport on an Austrian state-run airline. The plane crashes on the runway in Vienna, and a plaintiff alleges that the Austrian crew failed to inspect the landing gear before takeoff in New York. Is the gravamen of the action the crash in Vienna or the failure to inspect in New York? *Cf. Executive Jet*, 409 U.S. at 266-67 (noting the "serious difficulties" of determining whether the tort involved in a plane crash occurred where plane first incurred damage or where it crashed). Would the answer be different if the plaintiff also alleged negligence in landing the plane in Vienna? What about a negligent flight plan

designed jointly by the control tower in Austria and the pilots in New York? It is impossible to say.[16]

Worse yet, the gravamen test would require courts to decide the difficult question of whether an element is the "'most important' part" of a lawsuit prior to any litigation on the merits. U.S. Br. 22 (citation omitted). Jurisdictional tests should not require courts "to decide to some extent the merits of the [the plaintiff's lawsuit] to answer the legally and analytically antecedent jurisdictional question." *Sisson*, 497 U.S. at 365. But the gravamen test would involve precisely this sort inquiry. As Judge Tatel recognized for a unanimous panel of the D.C. Circuit, it would be a "problem" to require courts to look beyond the alleged elements of a plaintiff's claim in FSIA cases because that would "tie[] sovereign immunity to the merits of the plaintiff's claim." *See Kirkham*, 429 F.3d at 293.

One need look no further than the facts of this case to see why. To apply a gravamen test here, a court would potentially have to figure out both whether OBB breached its duty of utmost care (owed to Sachs as a ticketed passenger) and whether it breached a duty of ordinary care (owed to any bystander on the platform). *See infra* at 48. If OBB breached the former but not the latter, its sale of a ticket to Sachs would become dispositive and therefore seemingly the "most important" element of her action. But if OBB breached even an ordinary duty of care, then perhaps its mere operation in

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[16] The same uncertainty would arise in the employment contract scenario discussed above at 35. How would one locate the gravamen of a complaint where the contract is formed in the United States but breached abroad?

Austria of its trains would be the most important thing here. This sort of uncertainty – and resulting cart-before-the-horse litigation – should not be tolerated in a subject-matter jurisdiction test.

ii. The one-element test offers a straightforward rule and avoids any need to evaluate the relative importance of every element of the action. Under this test, courts need only identify whether the relevant conduct on U.S. soil constitutes an element of the action. Indeed, circuit courts have successfully applied the one-element test for decades in cases factually similar to this one. *See Kirkham*, 429 F.3d at 292 (airline business); *Sun*, 201 F.3d at 1109 (travel abroad); *Barkanic*, 822 F.2d at 13 (2d Cir. 1987) (airline). And other courts of appeals have successfully applied this test in other settings. *Santos*, 934 F.2d at 893; *BP Chems.*, 285 F.3d at 682.

OBB does not even dispute the superior administrability of the one-element test. Instead, it contends that the gravamen test is necessary to prevent plaintiffs from securing jurisdiction by "artful pleading." Petr. Br. 35 (citing *Nelson*, 507 U.S. at 363). But *Nelson*'s prohibition against "artful pleading" is specific to claims of "intentionally tortious conduct." 507 U.S. at 363. In particular, this Court held that plaintiffs in cases involving the FSIA cannot dress up an intentional tort claim as a defendant's failure "to announce its own tortious propensity before indulging it." 507 U.S. at 363; *see also id.* at 373 (Kennedy, J., concurring in part and dissenting in part) (noting that the majority's "summary treatment" of the failure-to-warn claim "may stem from doubts about the underlying validity" of that cause of action). Permitting such

manipulation would allow plaintiffs to "recast virtually any claim of intentional tort *committed by sovereign act* as a claim of failure to warn," thereby "effectively thwart[ing] the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity." *Id.* at 363 (emphasis added).

No such problem exists here. There is nothing manipulative about the garden-variety tort causes of action that Sachs alleges. Nor is there any sovereign activity that Sachs is challenging – either explicitly or implicitly. So there is no worry that allowing her to frame her lawsuit as she deems appropriate will thwart the purpose of the FSIA.

4. In its petition for a writ of certiorari, OBB did not contest the Ninth Circuit's determination that Sachs's action satisfies the one-element test. OBB nevertheless raises new arguments in its merits brief that challenge that holding. *See* Petr. Br. 34-35. This Court should deem these arguments to be waived, *see, e.g.*, *Taylor v. Freeland & Krontz*, 503 U.S. 638, 646 (1992), particularly because most turn on state instead of federal law and would be unlikely to provide guidance to litigants in any future cases.

At any rate, OBB's arguments are unavailing. OBB first argues that, as a matter of California law, Sachs's negligence claim does not depend on her purchase of the Eurail pass. Petr. Br. 34; *see also* U.S. Br. 30 (arguing same).[17] This Court, however, extends a "presumption of deference [to] the views of a federal court as to the law of a State within its

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[17] As the United States notes (Br. 28 n.11), jurisdiction under the FSIA does not necessarily mean that U.S. law applies. But OBB does not challenge the court of appeals' holding that California law applies here.

jurisdiction," typically declining to second-guess whether such state-law assessments are correct. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998). There is no reason to deviate from that general rule here because nothing about California law informs the question how to interpret the FSIA.

Even if this Court did wish to wade into California law, the Ninth Circuit correctly determined that Sachs's ticket purchase is a necessary element of her action. A common carrier owes an individual without a ticket a duty only of "ordinary care and diligence." Cal. Civ. Code § 2096; *accord* Petr. Br. 34. But a common carrier owes ticket purchasers like Sachs a heightened duty of "utmost care and diligence." Cal. Civ. Code § 2100. Sachs alleges that this duty of utmost care was breached. J.A. 15. Consequently, her purchase of the railway pass was a necessary element for her claim of negligence in operating the train.[18]

OBB next argues that Sachs's implied warranty claims fail the one-element test. Petr. Br. 34-35. But this argument depends on yet another legal assumption that it has never briefed or argued – namely, that the commercial activity exception

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[18] Contrary to the Government's suggestion (Br. 30), *Grier v. Ferrant*, 144 P.2d 631 (Cal. Dist. Ct. App. 1944), does not undermine this conclusion. Faced with a dispute involving taxis, *Grier* recognized an exception to the general rule that a holding a ticket or a pass is necessary to establish to a common-carrier duty of care. *Id.* at 310-11. The court reasoned that taxis are different from other common carriers because "taxicab fares cannot be computed and therefore are not collected until the termination of the trip or journey." *Id.* at 311. So for taxicabs, a common-carrier duty can arise before any fare is charged or collected. *Id.*

requires a plaintiff to satisfy the exception's requirements with respect to each and every claim in the complaint. This assumption is seriously debatable.

As the United States acknowledges, U.S. Br. 22, Clause One requires that the plaintiff's "action" – not each "claim" – be based upon a commercial activity carried on in the United States. 28 U.S.C. § 1605(a)(2). The Clause also determines whether the plaintiff's "case" may proceed in federal court. *Id.* § 1605(a). The words "action" and "case" are "synonymous" with "suit" – that is, the plaintiff's overall complaint. *Black's Law Dictionary* 35 (10th ed. 2014) (citation and internal quotation marks omitted). Furthermore, construing Section 1605(a)(2) to refer to the entire lawsuit, not individual claims, would be consistent with the purpose of the FSIA. The Act is designed to shield foreign states from being haled into U.S. court. Once they are already properly there, little would be gained by using the Act as a scalpel for excising individual claims – at least where, as here, those claims do not implicate any sovereign act.

The Solicitor General asserts that "a claim-by-claim analysis is warranted." U.S. Br. 22. But this assertion is not coupled with any argumentation, and none of the authority the Solicitor General cites after his bare assertion actually supports the assertion.[19]

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[19] The Solicitor General cites *Nelson*, *Keene Corp. v. United States*, 508 U.S. 200 (1993), and 28 U.S.C. § 1330. But none deals with whether the word "action," let alone the word "action" in Section 1605(a)(2), requires a "claim-by-claim" analysis. *See Nelson*, 507 U.S. at 362-63 (stating that "the Nelsons' *action* is based upon a sovereign activity immune from subject-matter jurisdiction") (emphasis added); *Keene Corp.*, 508 at 210

Under these circumstances, this Court ought not to venture an answer on a legal issue that petitioner has never raised at any stage of this litigation.

In any event, the Ninth Circuit correctly held that the ticket purchase is also an element of Sachs's implied warranty claims. OBB contends that implied warranty claims can be pressed only with respect to "the sale of goods, not to the sale of a ticket for services." Petr. Br. 35; *accord* U.S. Br. 32. But a "bailor" under California law who charges money for use of a chattel "impliedly warrants that he has exercised reasonable care to ascertain that the chattel is safe and suitable for the purpose for which it is hired." *McNeal v. Greenberg*, 40 Cal. 2d 740, 742 (1953). That is Sachs' theory here – namely, that OBB acted as a bailor when it sold her a Eurail pass and breached its implied warranty of fitness when it supplied her with an unsafe train. J.A. 17-18.[20] It remains to be litigated on remand "[w]hether Sachs has properly pleaded these claims" – that is, whether these claims are substantively sound under state law. Pet. App. 38a n.16. But that is "irrelevant to the jurisdictional inquiry" here. *Kirkham*, 429 F.3d at 293. All that matters is that Sachs' bases her theory

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(defining "claim" where two "comparable claims" were pending in two different courts); 28 U.S.C. § 1330 (conferring personal jurisdiction over foreign entities "as to any claim for relief" where immunity does not apply).

[20] The Ninth Circuit may not exactly have understood Sachs' theory because it cited Cal. Civil Code § 2341, which deals with "goods," Pet. App. 39a, instead of Cal. Civil Code § 1955, which concerns bailments. *See Holmes Packaging Machinery Corp. v. Bingham*, 252 Cal. App. 2d 862, 869 (1985). But OBB never challenged the legitimacy of Sachs' implied warranty claims below.

of recovery on commercial activity occurring in the United States, *id.*, which she does.

The Solicitor General (but not OBB) also argues that Sachs' strict liability claims "bear no relationship to the pass or its purchase" because even a "bystander" can bring such claims under California law. U.S. Br. 30-31. But for any plaintiff to succeed in California, the defendant must have placed the item at issue "on the market." *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 253 (1970). And under Sachs' bailment theory, OBB put temporary use of its trains on the market by selling Eurail passes in the United States – an act that not only enticed Sachs to engage in a commercial transaction with OBB but also to come to Austria. Having reached into this country in this manner, OBB should not now be able to cloak itself in a shield of immunity.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

No. 13-1067

In The
Supreme Court of the United States

OBB PERSONENVERKEHR AG,

Petitioner,

v.

CAROL P. SACHS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

As noted in Petitioner's Brief on the Merits, OBB Personenverkehr AG ("OBB") is an instrumentality of a foreign state, the Republic of Austria. OBB's stock is wholly held by OBB Holding Group, a joint-stock company organized under Austrian law and created by the Republic of Austria pursuant to the Austrian Federal Railways Act. The sole shareholder of OBB Holding Group is the Austrian Federal Ministry of Transport, Innovation and Technology, an organ of the Republic of Austria.

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ARGUMENT

I. INTRODUCTION

Respondent's and her amicus NML's arguments ignore this Court's holdings in *Nelson* and *Bancec*, and the plain language of the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602 *et seq.* ("FSIA").

They argue that the commercial activity exception's "based upon" requirement is satisfied if any element of a cause of action has a factual connection to the United States. Resp. 37-51; NML 29-33. However, in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), this Court held that the first clause of the commercial activity exception focuses on the "basis," "foundation" or "gravamen" of the action, instead of on any one element of a cause of action. *Id.* at 356-57. Under *Nelson*, Respondent's claim is "based upon" the accident that occurred in Austria, not the on-line sale of her Eurail Pass by U.S. travel agent RPE, which was never alleged to be wrongful. *Accord* U.S. 9, 27-28, 32 (supporting reversal).

Respondent's argument that the commercial activity should, under the "based upon" analysis, be broadly construed as OBB's operation of a "railway enterprise," Resp. 11, goes nowhere. Respondent did not sue OBB because it operates a railway enterprise. Her claim of wrongdoing is based on a particular act: the accident at the train station in Austria.

In support of the Ninth Circuit's holding that RPE's ticket sale could be attributed to OBB,

Respondent argues that Congress could not possibly have meant what it said when it mandated that the definition of "foreign state" in §1603(a) applies to the *entire* FSIA (excepting only §1608, irrelevant here). But there is no basis for this Court to depart from the plain text of §1603 and follow the Ninth Circuit's distinction – found nowhere in the commercial activity exception – between agents for purposes of "invocation" and "attribution," Resp. 18-20; NML 15-16. Sections 1603(a) and (b) define a foreign state to include corporate entities in addition to the foreign sovereign. Thus, these sections already attribute the acts of those corporate entities to the foreign state, and that attribution applies in determining what constitutes "commercial activity by such state" under §1605(a)(2). NML's distinction between "agency" and "agent" also fails, Resp. 20; NML 15-16, because neither §§1603(a) or (b), nor the first clause of the commercial activity exception, attribute the acts of "common law agents" to the foreign state. Where Congress intended to make a distinction in the FSIA between "agencies" and "agents," it did so expressly in the terrorism exception. §1605A.

Alternatively, if this Court departs from the FSIA's text, it must do so consistently with *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629-30 (1983) ("*Bancec*"). Respondent and NML incorrectly state that *Bancec* focuses only on "alter egos." Resp. 7, 10, 22-23; NML 19-20. *Bancec* also held that an "agent-principal relation" arises under the FSIA where there is

sufficient "control" by the principal over the agent under federal common law principles. 462 U.S. at 629-30. "Control" is a fundamental component of the "agent-principal relationship" under *Bancec*. Yet it was absent from the test for attribution applied by the Ninth Circuit and there is zero evidence in the record that OBB controlled RPE. It is undisputed that RPE would *not* be an agent of OBB under §1603(b) or *Bancec*.

In the end, Respondent offers arguments based not on this Court's holdings or statutory text, but on the flawed premise that subject matter jurisdiction over claims against a "foreign state" should be indistinguishable from and co-extensive with personal jurisdiction over foreign private corporations. Resp. 2. However, under the FSIA, and unlike private parties, "foreign state[s] shall be immune from the jurisdiction of the courts of the United States" unless an exception applies. §1604.

Here, the commercial activity exception does not apply. Accordingly, the Ninth Circuit's *en banc* decision should be reversed.

II. UNDER *NELSON*, RESPONDENT'S ACTION IS "BASED UPON" THE ACCIDENT IN AUSTRIA

Stare decisis compels that *Nelson*, which interpreted the "based upon" requirement under the first clause of the commercial activity exception, be followed. *Nelson*, 507 U.S. at 356-58; *Kimble v. Marvel*

Entm't, LLC, 135 S.Ct. 2401, 2409 (2015) ("*stare decisis* carries enhanced force when a decision . . . interprets a statute"). *Nelson* requires reversal because Respondent's claim is based upon the accident that occurred in Austria, not the preceding sale of a ticket in the United States. Respondent's and NML's "one-element" test would implicitly overrule *Nelson*.

A. This Action Is Based Upon an "Act" or "Activity" in Austria

1. This Action Is Not Based Upon "OBB's Railway Enterprise"

Respondent argues that the first clause's requirement that the action be "based upon commercial activity" directs a court to focus generally on "OBB's railway enterprise," as opposed to any particular "act." Resp. 24.

Before the Ninth Circuit, Respondent never argued that her claim was based upon "OBB's railway enterprise." She argued that her "claims are 'based upon' the purchase of the ticket which occurred in the United States." Appellant's Opening Brief, 2011 WL 2180427 at *10 (May 25, 2011); Appellant's Reply Brief, 2011 WL 3287994 at * 8 (July 19, 2011) (Respondent argued that "her claim was based on the purchase/sale of the ticket."). Thus, Respondent's "railway enterprise" argument must be rejected because it was not made below. *Chaidez v. U.S.*, 133 S.Ct. 1103, 1113 n. 16 (2013).

Even if this Court considered Respondent's new "railway enterprise" argument, its premise that the focus should not be on a particular act is wrong. "'[C]ommercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act," §1603(d). Here, this action is not based upon OBB's railway enterprise, but on the particular accident in Austria. Thousands of other passengers that same day utilized OBB's "commercial railway business," Resp. 27, but none of them have any claim because they were not involved in an accident.

Respondent argues that "[u]nder the 'substantial contact' requirement, the commercial activity must occur 'in whole or in part in the United States,'" and "OBB's railway business has 'substantial contact' with the United States" by "marketing and selling Eurail passes" here. Resp. 29-30 (citation omitted). But Respondent's claim must still be "based upon" the commercial activity that occurs in part in the United States. *Nelson* held that the "action must be 'based upon' *some* 'commercial activity' by petitioners that had 'substantial contact' with the United States within the meaning of the Act." 507 U.S. at 356 (emphasis added). Respondent is not suing because she purchased her ticket here. And, unrelated OBB ticket sales are irrelevant also for that reason.

Respondent also attempts to argue that RPE's sale of the Eurail Pass triggers the first clause of the commercial activity exception. She argues that courts should first construe "activity" of the foreign state as

broadly as possible[1] ("OBB's overall commercial railway enterprise") and then match any one element of any cause of action to that activity. Resp. 24. However, *Nelson* held that courts must "*begin* [*their*] *analysis* by identifying the *particular conduct* on which the Nelsons' action is 'based'"; that is, the gravamen. 507 U.S. at 356-57 (emphasis added). Respondent's proposed order and scope of inquiry are, under *Nelson*, wrong. The proper focus is on the "particular conduct" the action is "based upon," not on every conceivable activity (a ticket sale) in which the "entire commercial enterprise" might be involved. Resp. 23-25.

As the Government agrees, the "particular conduct" on which Respondent's action is based is the accident at the train station in Austria, not the sale of a Eurail Pass or general operations that include ticket sales. The "arguably commercial activities that preceded the[ ] [torts'] commission" (in *Nelson* the recruitment and signing of a contract with Nelson and here RPE's ticket sale), 507 U.S. at 358, only "led to the conduct that eventually injured the Nelsons [or the Respondent], they are not the basis for the Nelsons' [or the Respondent's] suit." *Id.* Nelson signed a contract in the United States and Respondent purchased a ticket in the U.S., but neither contractual act is the basis of their claims. And, Respondent's

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[1] However, FSIA exceptions are narrowly drawn. *See, e.g.*, *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1075 (D.C. Cir. 2012).

baseball analogy, Resp. 25, does not get her to first base under *Nelson*, because RPE's ticket sale "alone entitle[s] [the Respondent] to nothing under [her] theory of the case." 507 U.S. at 358.

2. Nothing in the Second and Third Clauses of the Commercial Activity Exception Change the Result Required by *Nelson*

To the extent there is a meaningful distinction in the "based upon" inquiry as applied to the first clause, as opposed to clauses two and three, this Court already addressed it in *Nelson*, 507 U.S. at 358. It is not, as Respondent maintains, a distinction between an "act" and "activity," allowing for a *broader* nexus between the suit's allegations and any aspect of the foreign state's "overall commercial . . . enterprise" under the first clause. Resp. 24-28. The important textual distinction lies with the second and third clauses' application to an act "*in connection with* a commercial activity of the foreign state elsewhere." §1605(a)(2) (emphasis added). As *Nelson* explained, "Congress manifestly understood there to be a difference between a suit 'based upon' commercial activity and one 'based upon' acts performed 'in connection with' such activity. The only reasonable reading of the former term calls for something *more than a mere connection with, or relation to, commercial activity.*" 507 U.S. at 358 (emphasis added). Under *Nelson*, the first clause demands a *tighter* nexus than the second and third clauses, contrary to Respondent's argument

that the first clause broadly requires only a connection with some aspect of the "overall commercial . . . enterprise."[2]

B. The "One-Element" Test Is Contrary to *Nelson* and the Text of the FSIA

Respondent's argument for a "one-element" test is based on her assertions that the term "based upon" is ambiguous, Resp. 40, and does not mean "foundation" or "most important element," but "can refer to *any* necessary factor, not just the primary or most important one." Resp. 39. (emphasis in the original); *see also* NML 29-31. That argument was rejected in *Nelson*, which held that "[a]lthough the Act contains no definition of the phrase 'based upon,' and the relatively sparse legislative history offers no assistance, guidance is hardly necessary." 507 U.S. at 357.

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[2] Respondent's strained attempt to rely on the first clause (the only clause she invokes) is like trying to fit a square peg into a round hole, because the FSIA is not designed to redress tort injuries overseas. She does not invoke the third clause because "[e]very court that has considered a claim for personal injury sustained in foreign territory has held that subsequent physical suffering and consequential damages are insufficient to constitute a 'direct effect in the United States' for purposes of abrogating sovereign immunity." *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415, 418 (5th Cir. 1987). And, the second clause would not apply because it "is generally understood to apply to non-commercial acts in the United States that relate to commercial acts abroad," and the RPE's ticket sale is not a "non-commercial" act. *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147, 157 (2d Cir. 2007) (citation and quotations omitted).

"In denoting conduct that forms the 'basis,' or 'foundation,' for a claim, . . . the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.*; *accord* U.S. 19-20. The Court focused on the "basis," "foundation" or "gravamen" of a cause of action ("gravamen test"). 507 U.S. at 357 (citation and quotations omitted). It did not analyze the elements of the sixteen different causes of action in *Nelson* because, under the gravamen test, such an analysis was irrelevant. *Nelson* forecloses the "one-element" test.

Nelson's focus on the gravamen of the action correctly applies the language of the "based upon" requirement. It directs courts to focus, in a tort case, on the act that constitutes wrongdoing. In *Nelson*, those were the acts that injured Mr. Nelson, not other contract-related commercial activities that "led to the conduct that eventually injured" the plaintiff. 507 U.S. at 358. Even NML agrees that this was at the heart of *Nelson*'s "based upon" analysis. NML 31. Respondent's suggestion that *Nelson* left the door open to a "one-element" test is wrong. Resp. 39. *Nelson* rejected such an approach as crediting "a semantic ploy" that invites artful pleading to circumvent sovereign immunity. *Id.* at 363.

Respondent's and NML's other arguments fare no better. Their dictionary definitions do not change the result. Resp. 39-40; NML 30. The "underlying fact or condition," or that "upon which a structure is built," point to the same thing: the accident in Austria. And

Respondent's citations to other U.S. Code sections (using the terms "based entirely," "based primarily," or "based partly"), Resp. 40, do not help her, because the FSIA uses a different term – "based upon."

Respondent has failed to establish that *Nelson* was "badly reasoned" or that application of *Nelson*, in the twenty-two years since that decision was rendered, has revealed that it is "unworkable."[3] *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). There is no basis to depart from *Nelson*.

C. The FSIA Does Not Treat Foreign States the Same As Private Parties for All Purposes

In an attempt to avoid both the FSIA's text and *Nelson*, Respondent broadly argues that foreign states must be treated the same as private parties

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[3] Although Respondent suggests the "gravamen" test is unworkable, the Second Circuit had no trouble understanding or applying *Nelson*. *See Kensington Int'l*, 505 F.3d at 156 ("Applying the principles of . . *Nelson*, we cannot agree with Kensington's position that its action is 'based upon' the alleged acts in the United States merely because those acts satisfy the interstate commerce element of the RICO statute"). The Second Circuit rejected "Kensington['s] conten[tion] that it has satisfied the 'based upon' element because it need only show that *one* of the elements of its cause of action is established by the commercial activity in the United States." *Id.* (emphasis in original). Instead, it held that "the gravamen of Kensington's complaint" lacked the nexus to the United States required to trigger the commercial activity exception. *Id.*

under the FSIA. Resp. 1; *see also* NML 5-10. But the FSIA does not state that foreign states must generally be treated the same as private parties. It provides:

> As to any claim for relief *with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter*, the foreign state *shall be liable* in the same manner and to the same extent as a private individual under like circumstances. . . .

§1606 (emphasis added). Only if a plaintiff can overcome sovereign immunity may the foreign state be held "liable" in the same manner as a private party.

This means that the FSIA "is not intended to affect the substantive law of liability." *Bancec*, 462 U.S. at 620 (quoting H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. 12 (1976)). It does not mean that foreign states and private parties are treated alike for *all purposes*. The FSIA contains a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Republic of Argentina v. NML Capital, Ltd.*, 134 S.Ct. 2250, 2255-56 (2014) (citation and quotations omitted). And, it codified "international law," *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007), not domestic procedural doctrines.

It would be improper to depart from the FSIA's text[4] and apply personal jurisdiction jurisprudence regarding foreign private corporations instead of the "based upon" requirement as articulated in *Nelson*, because Congress explicitly stated when a foreign state may be treated like a private party.

Similarly, Respondent argues that the "arising under" test for exercise of personal jurisdiction over private parties supports the "one-element" test. NML 21-33; *but see* U.S. 24 n.7. How lower courts may interpret the term "arising under" to exercise personal jurisdiction over private parties is irrelevant. The FSIA is the "sole basis" for obtaining subject matter jurisdiction as to foreign states. *Nelson*, 506 U.S. at 355. Under the FSIA, "both statutory subject matter jurisdiction ... and personal jurisdiction turn on application of the substantive provisions of the Act." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 485 n.5 (1983). The text requires "commercial activity *carried on in the United States* by the foreign state," §1605(a)(2) (emphasis added), not a general "arising under" approach.

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[4] NML prevailed before this Court because "any sort of immunity defense made by a foreign sovereign in an American court must stand on the [FSIA]'s text. Or it must fall." *NML Capital*, 134 S.Ct. at 2256. NML's contrary position now, urging this Court to disregard the FSIA's text and apply rules regarding personal jurisdiction over private parties, highlights that NML's interests are driven by its bond-related litigation with Argentina. NML 2-3.

D. Respondent's Sovereign Acts Argument Is a Red Herring

Respondent argues that this case is the "inverse of *Nelson*" because the conduct in *Nelson* was sovereign rather than "commercial," and "even if the gravamen test were the correct way to assess that question it would not matter here. Sachs's suit has nothing to do with any sovereign activity." Resp. 27-28. OBB has never argued that it engaged in "sovereign activity" and *Nelson* is not limited to that issue. *Nelson* controls because it explains the correct order and scope of the inquiry under the first clause. One must first "identify[ ] the particular conduct on which Nelson's action is 'based' for purposes of the Act," and then determine whether that conduct was commercial or sovereign. *Nelson*, 507 U.S. at 356-63.

E. The Gravamen Test Fosters the FSIA's Purposes

Nelson's approach favors clear and predictable jurisdictional rules; Respondent's "one-element" test does not. The gravamen test is straightforward, here focusing on the alleged "torts, and not the arguably commercial activities that preceded their commission, [that] form the basis for the . . . suit." 507 U.S. at 358. The "one-element" test opens the door to complexity, requiring courts to analyze the elements of each state law claim. As *Nelson* held, such an approach invites gamesmanship. And, since the FSIA does not change "substantive liability," a foreign state seeking predictability would face the onerous task of reviewing

multiple states' laws, if it sought to limit its exposure to jurisdiction in the U.S.

Nelson illustrates the simplicity of the gravamen test versus the "one-element" test. The majority's "based upon" analysis required only one paragraph, without wading into the weeds of choice of law determinations and identification of elements for each claim. 507 U.S. at 358. The division between the majority and dissent arose only upon examination of the elements of the negligent failure to warn claims. *Id.* at 363, 371, 375.

The only certainty that the "one-element" test provides is that plaintiffs will be encouraged to artfully plead around a foreign state's immunity. Thus, *Nelson* refused to apply the "based upon" requirement in a manner where "a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn" and be "give[n] jurisdictional significance to this feint of language." 507 U.S. at 363.

Finally, Respondent's and NML's policy arguments fail. They incorrectly treat the impact on private plaintiffs as the primary policy goal, Resp. 33-34; NML 8-9, when the FSIA is focused primarily on extending immunity to foreign states. *See* §1604.

Respondent argues that "it is reasonable that when a foreign entity reaches into this country and offers a service . . . that they will be able to vindicate their rights in U.S. courts." Resp. 32-35. While that may be a consideration under *International Shoe v.*

Washington, 326 U.S. 310 (1945)'s personal jurisdiction analysis, it is irrelevant for purposes of determining *subject matter jurisdiction*, which is governed solely by the FSIA with respect to foreign states. In any event, Petitioner provided train travel entirely within Austria.

Respondent's additional argument that foreign states can invoke *forum non conveniens* or contract around jurisdiction, Resp. 35-36, misses the mark. Congress already decided the issue by affording foreign states immunity under the FSIA, and not leaving them to rely on procedural doctrines or contracts.

There is no dispute that if the gravamen test in *Nelson* is applied, this action is "based upon" the accident in Austria. The Government agrees. U.S. 9, 27-28, 32. The "one-element" test was properly rejected by *Nelson* because it would invite artful pleading. This Court should re-affirm *Nelson*'s focus on the gravamen of the action and reverse the Ninth Circuit.

III. RPE'S SALE CANNOT BE IMPUTED TO OBB UNDER THE FSIA

A. Under the Plain Text of the FSIA, Activity of RPE Is Not Activity of a "Foreign State"

Under §1603(a), RPE's sale of the Eurail Pass cannot be attributed to OBB for purposes of the immunity determination because RPE does not fit the definition of "foreign state." To avoid that result, the

Ninth Circuit ignored §1603 and imported unspecified common law agency principles regarding "ambiguous relationships" to hold that RPE was OBB's agent.

In support of that result, Respondent offers an argument that the Ninth Circuit never made: "[t]he statutory phrase 'carried on' necessarily incorporates general common-law agency principles." Resp. 13; NML 3-4, 11-14. That argument must be rejected because the text of the FSIA's commercial activity exception, §1605(a)(2), and its statutory definitions, §§1603(a) and (b), are the starting and ending point of the analysis. Specifically, the first clause requires that the claim be based upon "commercial activity carried on in the United States *by the foreign state*." §1605(a)(2) (emphasis added). Congress defined the phrase commercial activity "carried on . . . by the foreign state" in the FSIA, stating that it "means commercial activity carried on *by such state*." §1603(e) (emphasis added). Congress could have, but did not, define the term to mean "carried on by such state *or its common law agents*."

Under the FSIA's definitions, the term "foreign state, except as used in section 1608," includes "an agency or instrumentality of a foreign state," §1603(a), which is defined to include separate corporations majority-owned by the foreign state, §1603(b). The definitions control whose acts constitute commercial activity "by the foreign state," including as the phrase is used in the commercial activity exception, §1605(a)(2). *Powerex Corp. v. Reliant Energy Servs.*,

Inc., 551 U.S. 224, 232 (2007) ("[I]dentical words and phrases within the same statute should normally be given the same meaning.").

Congress's directive that the definition of "foreign state" be consistently defined with respect to FSIA-based jurisdiction is also found in 28 U.S.C. §1330(a): "[t]he district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action *against a foreign state as defined in section 1603(a)* of this title. . . ." (emphasis added).

Respondent argues that, in some contexts, there is a distinction between "agency" and "agent," Resp. 20; NML 15-16, and that distinction should apply to the commercial activity exception because "[l]ike a corporation, a foreign state can act 'only through its agents.'" Resp. 13 (citation omitted); U.S. 10; NML 3-4, 11-14. But she confuses the acts of an employee or government official of the foreign state with the concept of an agent as a separate legal entity, *see* §1603(b). While a foreign state (like a corporation) must perform its acts through *individual* agents (employees or officials), foreign states (like OBB) or corporations do not necessarily act through *other entities* serving as their agents. Thus, the argument that "Congress . . . would have expected that courts would use traditional agency principles to determine whether a foreign state 'carried on' commercial activity," is flawed. Resp. 13; *see also* NML 4.

Further, Congress did not, as the Ninth Circuit held (based on its own conception of "common sense")

and Respondent argues, make a distinction between "invocation" and "attribution" in determining which entities are subject to immunity. Resp. 18-20; NML 15-16. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted). The Ninth Circuit's opinions about what it believes Congress intended are irrelevant. This Court "will not ignore a clear jurisdictional statute in reliance upon supposition of what Congress *really* wanted." *Powerex Corp.*, 551 U.S. at 237 (emphasis in the original).

There is no distinction in the commercial activity exception's text between acts of a foreign state for purposes of invoking immunity versus acts attributable to it to defeat immunity. Resp. 18. Rather, Congress already made the "attribution" election in §§1603 and 1605. The definition of a foreign state in §§1603(a) and (b) includes "agencies and instrumentalities" in addition to the foreign sovereign and, thus, attribute acts of third parties to the "foreign state," but not those of "common law agents." The definitions govern whose commercial activity constitutes acts "by the foreign state" under §1605(a)(2). And the definitions apply to the commercial activity

exception, because §1603(a) states that they apply to the entire FSIA except only §1608.[5]

NML's argument that courts must look at agency common law in the commercial activity exception because other exceptions look to the substantive law of liability is wrong. NML 18 (citing tortious activity exception in §1605(a)(5)). NML's examples do not concern defined terms. And NML acknowledges that references to agency common law must be premised on federal law (conceding the *Bancec* argument, *infra*).

Respondent attempts to refute the plain text by references to "ordinary usage," arguing that "the question whether an entity is an 'agency' (and

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[5] This Court should not depart from the FSIA's text, given this Court's reiteration in *NML Capital* that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." 134 S.Ct. at 2256. The cases cited by Respondent, Resp. 12 n.8, are distinguishable or support the Petitioner's *Bancec* argument, *infra*. *See, e.g.*, *Mar. Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094 (D.C. Cir. 1982) (no attribution of purported agent's conduct due to lack of control and direction); *First Fid. Bank, N.A. v. Gov't of Antigua & Barbuda-Permanent Mission*, 877 F.2d 189, 193-94 (2d Cir. 1989) (individual agent and not corporate entity); *Velasco v. Gov't of Indonesia*, 370 F.3d 392 (4th Cir. 2004) (individual officers); *Dale v. Colagiovanni*, 443 F.3d 425 (5th Cir. 2006) (individual agent); *BP Chems. Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677 (8th Cir. 2002) (parties did not dispute the application of common law); *Orient Mineral Co. v. Bank of China*, 506 F.3d 980 (10th Cir. 2007) (held bank was not agent); *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991) (reversed).

therefore a 'foreign state') under Section 1603(b) is completely different from whether it is an 'agent' for purposes of the FSIA's 'carried on' requirement." Resp. 20. Respondent's claim, that "in all of its possible definitions for 'agency,' Black's Law Dictionary never states that an entity to which authority is delegated may be called an 'agency,'" *id.*, is contradicted by the very first definition in the Black's version she cites, which states that "agency" means:

> 1. A relationship that arises when one person (a principal) manifests to another (*an agent*) that *the agent* will act on the principal's behalf, subject to the principal's control, and *the agent* manifests assent or otherwise consents to do so.

Black's Law Dictionary 74 (10th ed. 2014) (emphasis added).

Respondent also incorrectly argues that an "agency" in the FSIA context is limited to "an arm of the government." Section 1603(b) defines foreign states to include corporations majority-owned by the foreign state. Resp. 20.

Finally, if Congress had intended attribution in the commercial activity exception to extend beyond the definitions of "agency or instrumentality" to include common law agents, it would have said so. Congress did say so when it added the terrorism exception, §1605A, to the FSIA in 2008, which *explicitly* does what the Ninth Circuit, Respondent and

Government maintain Congress *intended* to do in §1605(a)(2). Section 1605A provides:

> A foreign state shall not be immune . . . in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture . . . if such act . . . is engaged in by an official, employee, *or agent* of such foreign state while acting within the scope of his or her office, employment, or agency.

§1605A(a)(1) (emphasis added). "If, as respondent[ ] seems to say, Congress intended" to extend applicability of the commercial activity exception to conduct carried on by an agent of the foreign state acting within the scope of its authority, one would "presume it would have used the word[ ] ['agent'] in the statutory text." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994). It is compelling that Congress did *not* use the word "agent" in the commercial activity exception, §1605(a)(2), but did use it in the terrorism exception, §1605A(a)(1). Similarly, with respect to liability, Congress used the word "agent" in the terrorism exception, §1605A(c), but did not use it with respect to liability under the rest of the FSIA, §1606.

And contrary to Respondent's claim, the explicit reference to "agent" in the terrorism exception is not superfluous. *See* Resp. 19 n.10. Section 1605A deprives foreign states of immunity for acts of its common law agents *in addition to* acts of entities

satisfying the statutory definition of an "agency or instrumentality." *See* §1605A(a)(1), (c); *see also Conn. Nat'l Bank*, 503 U.S. at 253 ("[C]ourts should disfavor interpretations of statutes that render language superfluous.").[6]

B. In the Alternative, *Bancec* Controls the Analysis and Requires Reversal

If common law agency principles apply, Respondent and Government recognize that *Bancec* is relevant. Respondent acknowledges that "*Bancec* is mildly 'instructive' here because it involved a question of imputation under the FSIA." Resp. 22.[7] And the Government cites *Bancec* as requiring that common law of agency be applied "in a manner that is consistent with 'articulated congressional policies' and 'internationally recognized' legal doctrine," with "limiting principles . . . to prevent a finding of an agency relationship on such a minimal basis that the foreign state could not be said to have 'carried on' the activities in which the 'agent' engaged." U.S. 14, 19.

Bancec, however, does not limit its analysis to alter egos. Resp. 7, 10, 22-23; U.S. 17; NML 19-20.

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[6] Respondent cites *Dole Food v. Patrickson*, Resp. 16, but *Dole* relied on common law corporate principles to *reinforce* a rule "supported by the statutory text," 538 U.S. 468, 477 (2003), not *depart* from the statutory text.

[7] NML states that "under *Bancec*, federal common law governs the attribution of conduct to a foreign state." NML 18.

Bancec held that attribution would be permitted *either* (1) where there is an alter ego relation or (2) "where a corporate entity is *so extensively controlled by its owner* that a relationship of principal *and agent* is created." 462 U.S. at 629 (emphasis added). Under *Bancec*, the foundational elements of an agent-principal relation are control and ownership.

Nonetheless, the Ninth Circuit expressly rejected the applicability of *Bancec* and never determined whether OBB exercised the requisite control over RPE. App. 21. As the Government emphasizes, "control" is a bedrock requirement to both federal common law of agency and international law, and a necessary requirement for the Government's textual reading of commercial activity "carried on . . . by the foreign state" extending to an agent's conduct. U.S. 6-7, 10-12, 17, 19. And tellingly, the Ninth Circuit did not hold, nor has any party argued, that OBB exercised sufficient "control" over RPE to give rise to an "agent-principal relation" under *Bancec*. There is no such evidence.

Under *Bancec*, RPE's ticket sale cannot be imputed to OBB for purposes of the immunity determination because RPE is not an "agent" of OBB.

C. Policy Considerations Favor OBB's Interpretation

Echoing the Ninth Circuit, Respondent and Government argue that application of §1603 or *Bancec* on attribution would lead to "intolerable" or

"untenable" results, and that "OBB offers no answer to this observation." Resp. 15-16; U.S. 16. They fret that a foreign state may shield itself from jurisdiction by acting through "agents" that do not fall within §1603(b) or meet the "control" requirement of *Bancec*. Immunity from jurisdiction, however, is an important purpose of the FSIA. §1604.

The Second Circuit has held:

> [G]iven the Supreme Court's *Bancec* decision, had either the Government or the Russian Federation wanted to shield the latter entity from being the subject of these confirmation proceedings, either could have designated a publicly-owned state corporation or instrumentality as the entity to contract with Noga.

Compagnie Noga D'Importation et D'Exportation S.A. v. Russian Fed'n, 361 F.3d 676, 685-86 (2d Cir. 2004). Indeed, *Bancec* held that "government instrumentalities established as juridical entities distinct and independent from the sovereign should normally be treated as such." 462 U.S. at 626-27. Otherwise, "the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration would surely be frustrated." *Id.* at 626.

The fears expressed by the Ninth Circuit, Respondent and Government are overstated. If travel originated at JFK Airport and a customer was injured there, the foreign state-owned carrier would have

conducted commercial activity "in the United States," and the first clause would apply *regardless of who sold the ticket*. This case presents a different situation, where the travel and accident occurred entirely outside of the United States.

Finally, policy considerations favor Petitioner's interpretation of the statutory language and counsel against the Ninth Circuit's holding. In *Daimler AG v. Bauman*, 134 S.Ct. 746, at 759-60 (2014), this Court rejected a similar Ninth Circuit attempt to invoke common law agency principles as a basis to expand personal jurisdiction over foreign private corporations. Now, the Ninth Circuit resurrects those vague common law agency principles in an attempt to expand jurisdiction over foreign states, making it easier to sue foreign states than it is, after *Daimler*, to sue private corporations. Based on vague common law agency principles, the Ninth Circuit attributes to the foreign state the acts of "entirely distinct entit[ies]," Resp. 10, instead of limiting attribution to the acts of "agencies or instrumentalities" as defined in §1603(b). Because in enacting §1603 "Congress had corporate formalities in mind," *Samantar v. Yousuf*, 560 U.S. 305, 316 (2010) (citation and quotations omitted), the purported agent must be "tightly connected," *see* Resp. 21, to the foreign state, instead of simply being geographically connected "to the United States." Resp. 21, 43. Further, the "one-element" test would allow U.S. courts to hear disputes in actions in which the foreign defendant's acts in the United States bear no relation to the basis of the claims.

That is far more than the Supreme Court has allowed in the private arena, where it has limited general jurisdiction carefully (*e.g.*, in *Daimler*).

Respondent also makes no effort to address the serious risk of damage to foreign relations created by the Ninth Circuit, as noted by amici Kingdom of the Netherlands and Swiss Confederation. NL/CH 15-16, 25. And, the Ninth Circuit's deviation from the plain text of the FSIA and *Bancec* also invites adverse retaliatory decisions that will negatively impact commerce, including the very sale of Eurail passes, *see* CIT 14, 16-17, which Respondent admits are "[l]ong a favorite of American travelers on a budget." Resp. 4.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case dismissed because OBB has foreign sovereign immunity.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

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In The
Supreme Court of the United States

OBB PERSONENVERKEHR AG,

Petitioner,

v.

CAROL P. SACHS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The petitioner is OBB Personenverkehr AG ("OBB"), an organ of a foreign state, the Republic of Austria. Pursuant to Supreme Court Rule 29.6, OBB's stock is wholly held by OBB Holding, a joint-stock company organized under Austrian law and created by the Republic of Austria pursuant to the Austrian Federal Railways Act. The sole shareholder of OBB Holding is the Austrian Federal Ministry of Transport, Innovation and Technology.

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RESPONSE TO BRIEF OF UNITED STATES

INTRODUCTION

The United States agrees with OBB Personenverkehr AG ("OBB") that the *en banc* Ninth Circuit erred in its application of the commercial activity exception in the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602 *et seq.* ("FSIA"), whereby a foreign state is not immune from suit when "the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. §1605(a)(2). The United States noted the Ninth Circuit's "overly permissive formulation of the 'based upon' standard" established by this Court in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), which conflicts with the Second Circuit. *See* U.S. Br. 6-7, 15, 18-19.

Moreover, the United States would accept, for purposes of "attribution," a new definition of "agency" based on "traditional agency law principles" that ignores the FSIA's statutory definition and the principles announced in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). Yet, even the United States admits that it is "unclear" whether the Ninth Circuit was correct in holding the domestic travel agent, Rail Pass Experts ("RPE"), to be OBB's agent, because there was no evidence or even allegation that OBB controlled RPE, a hallmark of agency. *See* U.S. Br. 8, 9, 13. The Ninth Circuit created a "based upon" standard unmoored from this Court's reasoning in *Nelson* that radically expands the commercial activity

exception. OBB and the United States, while advocating different formulations for what is activity "by the foreign state," agree that a standard of agency devoid of the element of "control," like that of the Ninth Circuit's, is wrong.

Nonetheless, the United States argues that "this case is not an appropriate vehicle" for certiorari. U.S. Br. 6, 20-23. But its proffered reasons (directed at the "based upon" inquiry) lack merit. The United States' argument that this is a "case-specific inquiry" with a "lack of development below" ignores that, for purposes of this analysis, the critical facts are undisputed: the ticket was sold domestically and the injury occurred in Austria. Review is required because the Ninth Circuit has vastly expanded the commercial activity exception to apply in all instances where tickets for foreign travel are sold by a domestic travel agent even if it had no connection to the foreign state-owned carrier. *See* App. 41.

This case has substantial commercial and foreign policy implications. The United States ignores the concerns of the Netherlands that this decision creates a "substantial risk of jurisdictional and diplomatic conflict." Government of the Kingdom of the Netherlands Amicus Br. ("Netherlands Br.") 1-2. With tens of thousands of Americans purchasing Eurail Passes each year, this holding will "fundamentally alter the way Eurail passes are marketed and sold, to the detriment of American travelers." International Rail Transport Committee Amicus Br. ("CIT Br.") 2, 14. The Ninth Circuit has done what this Court chastised

it for in *Daimler AG*: fashioning an "agency" definition that "stacks the deck" against foreign entities and "always yield a pro-jurisdiction answer" despite "the risks of international comity" and "considerations of international rapport." *Daimler AG v. Bauman*, 571 U.S. ___, 134 S. Ct. 746, 759, 763 (2014).

ARGUMENT

I. THE UNITED STATES HAS RECOGNIZED THAT THE NINTH CIRCUIT'S "BASED UPON" STANDARD CONFLICTS WITH SUPREME COURT AND OTHER CIRCUIT PRECEDENT. THIS COMPELS THIS COURT'S REVIEW.

A. The Ninth Circuit's "Based Upon" Standard Conflicts with Precedents from this Court and the Second Circuit.

The United States concurs with former-Chief Judge Kozinski and OBB that the Ninth Circuit's holding, governing whether claims against a foreign state are "based upon" the state's commercial activity in the United States, "conflict[s] with Supreme Court precedent" in *Nelson*. App. 62; U.S. Br. 14-19. The Ninth Circuit "applied an overly permissive formulation of the 'based upon' requirement." U.S. Br. 14. But it erred not merely by misapplying *Nelson* to the facts (although the United States found that too, was "unduly permissive," U.S. Br. 16). The Ninth Circuit held that the "based upon" requirement under *Nelson* is satisfied if "'*an element of* [the plaintiff's] claim

consists in conduct that occurred in commercial activity carried on in the United States,' or if such activity is an 'essential fact' to proving an element of the claim." U.S. Br. 15 (quoting Pet. App. 33, 35). The effect is to greatly expand when foreign states will be subject to suit under the subject exception. The Ninth Circuit's test also conflicts with the Second Circuit's "significant nexus" standard counseling review. *See* Pet. 34; *cf.* U.S. Br. 18-19. But more importantly, the Ninth Circuit's test is "problematic," U.S. Br. 15, and conflicts with *Nelson*, which did not employ such a formulaic test, but held that "the commercial activity must be the 'gravamen' – the essence or gist – of the plaintiff's claim, not simply a link in the chain of events that led to an overseas injury." U.S. Br. 15 (citing *Nelson*, 507 U.S. at 357). The Ninth Circuit's test encourages plaintiffs to do what *Nelson* condemned – engage in "semantic ploy[s]" and artful pleading to circumvent immunity. *Nelson*, 507 U.S. at 363. "To give jurisdictional significance to this feint of language would effectively thwart the [FSIA's] manifest purpose to codify the restrictive theory of foreign sovereign immunity." *Id.*

The Ninth Circuit's conflict with *Nelson* compels review, *see* Sup. Ct. R. 10, a ground left unaddressed by the United States, which only posited that "this case does not present an appropriate vehicle to resolve any conflict among the courts of appeals," *see* U.S. Br. 20. The Ninth Circuit's erroneous ruling will improperly drag foreign states into court, and adversely impact "international comity" and "international rapport." *See Daimler AG*, 134 S. Ct. at 759, 763.

B. This Case is an Appropriate Vehicle Compelling Review.

The United States' "inappropriate vehicle" arguments fall flat. The United States argues that the inquiry "requires an understanding of both the elements of the claims and of how the commercial activity relates to those elements." U.S. Br. 20. Such state-law details, however, have no bearing on the test announced in *Nelson*, which the United States recognizes as dispositive. In *Nelson*, this Court's analysis did not turn on elements of the causes of action:

> [T]he Nelsons have alleged that petitioners recruited Scott Nelson for work at the hospital, signed an employment contract with him, and subsequently employed him. While these activities led to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons' suit. The Nelsons have not, after all, alleged breach of contract, but personal injuries caused by petitioner's intentional wrongs and by petitioner's negligent failure to warn Scott Nelson that they might commit those wrongs. Those torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons' suit.

507 U.S. at 358.

It is undisputed that RPE sold the ticket domestically and the alleged tortious conduct occurred in Austria. Under *Nelson*, those torts, and not the preceding commercial activity in the United States,

form the basis for the claims. The record was fully developed factually for purposes of ruling on OBB's Fed. R. Civ. P. 12(b)(1) motion.

The United States' view is contrary to the position that it took in its amicus brief in *Nelson*, supporting certiorari. The United States argued in *Nelson* that the facts (not elements of the causes of action) established that the claims were based upon torts that occurred in Saudi Arabia, and advised that "[t]he court of appeals' contrary conclusion has the effect of subjecting a foreign state to the jurisdiction of a United States court concerning a matter that the FSIA places outside the authority of those courts." *See* Brief for the United States as Amicus Curiae, *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (No. 91-522) 1992 WL 12012040 at *18-19.

The United States' other arguments are meritless. That the case may be dismissed on grounds not considered by the District Court, U.S. Br. 21, is no cure because the FSIA conveys immunity from the burdens of litigation. *Rubin v. Islamic Rep. of Iran*, 637 F.3d 783, 794 (7th Cir. 2011). The United States also agrees that dicta in the Ninth Circuit's opinion weakens the likelihood of prevailing on forum non conveniens and comity arguments. U.S. Br. 21.

The United States finally argues that the circumstances here "arise only infrequently, and they will likely become rarer in the future." U.S. Br. 21. This ignores the sweeping scope of the Ninth Circuit's ruling, which subjects a foreign government-owned carrier to jurisdiction in U.S courts every time an

American books international travel from a domestic travel agent. Thousands of Americans annually purchase Eurail Passes domestically, CIT Br. 2, and this holding reaches all forms of international travel whenever a ticket is purchased domestically.[1] The United States ignores the "substantial risk of jurisdictional and diplomatic conflict" that this decision has thus engendered. *See* Netherlands Br. 1-2. The United States' argument that forum selection clauses will reduce the number of such suits is baseless. *Nelson* is Exhibit 1, where the Court observed that, "[p]resumably because the employment contract provided that Saudi courts would have exclusive jurisdiction over claims for breach of contract, the Nelsons raised no such matters." *Nelson*, 507 U.S. at 354. If the United States' prediction that such suits "will likely become rarer in the future" comes true, it will be as a result of counter-measures by foreign governments in response to this decision. As warned in the International Rail Transport Committee's amicus brief, this decision "is likely to fundamentally alter the way Eurail Passes are marketed and sold, to the detriment of American travelers." CIT Br. 14.

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[1] The Ninth Circuit's holding extends beyond travel cases to the sale of tickets for countless activities overseas. In light of the increasing amount of commercial activity on the Internet, and the fact that this case involves an Internet sale, this case presents a compelling vehicle to review these important and timely legal issues.

II. REVIEW IS ALSO WARRANTED FOR THE NINTH CIRCUIT'S HOLDING THAT TICKET SALES BY DOMESTIC TRAVEL AGENTS ARE ACTIONS "BY THE FOREIGN STATE" BECAUSE IT IGNORES THE PLAIN TEXT OF THE FSIA AND *BANCEC*.

Review is also warranted for the Ninth Circuit's holding regarding when there is "commercial activity carried on in the United States by the foreign state." The United States opines that "[t]he court of appeals correctly held that a foreign state may be found to have 'carried on' commercial activity in the United States when it has employed an entity to act as its agent in conducting those activities." U.S. Br. 7. But the dispute is over the definition and standard to be applied in making this agency determination.

The United States argues that "traditional agency law principles" of "direction and control" should dictate the agency inquiry. *See* U.S. Br. 8-9. Yet, the Ninth Circuit's decision was not based on "direction and control" because there was no evidence or even claim of direction or control by OBB over RPE. Rather, the Ninth Circuit announced a sweeping rule: the mere sale of a ticket on a foreign state carrier by a domestic travel agent subjects the carrier to suit in the United States. *See* App. 41.

A. The "Agency" Inquiry Starts and Stops with the Plain Text of the FSIA.

When interpreting the FSIA, as with any statute, courts "begin with the text of the statute," *Limtiaco v. Camacho*, 549 U.S. 483, 488 (2007), and "when the statute's language is plain, the sole function of the courts is to enforce it according to its terms," *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000) (internal quotations omitted).

The Ninth Circuit and the United States failed to apply the FSIA's plain text in determining when there is "a commercial activity carried on in the United States *by the foreign state*." 28 U.S.C. §1605(a)(2) (emphasis added). The United States' argument that courts must go outside the FSIA's text to general agency law is based on the false premise that the phrase "'carried on' by a foreign state" is not defined in the statute. U.S. Br. 7. However, Section 1603(e) defines that "[a] 'commercial activity carried on in the United States by a foreign state' means commercial activity *carried on by such state* and having substantial contact with the United States." 28 U.S.C. §1603(e) (emphasis added). Congress did not extend the scope of this phrase to common law agents. Instead, it stated that it applies to commercial activity "by such state."

Nor is there any need to go beyond the text to determine "the sorts of entities whose conduct may be *attributed* to a foreign state defendant for purposes of determining whether the foreign state has 'carried on'

commercial activity in the United States." U.S. Br. 10. The FSIA's definition states that "[a] 'foreign state,' except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. §1603(a). The United States ignores Congress' mandate that the definition of "foreign state" shall apply to all provisions except Section 1608 concerning service of process, and thus necessarily applies to the commercial activity exception in Section 1605(a)(2). *See Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970) (Congress set forth the only exceptions to the statute). The United States also overlooks that "attribution" is addressed by the extension of the term "foreign state" to include "agency" in Section 1603(a), which is in turn defined as including a "separate legal corporat[ion]," "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," and is not a United States citizen or created under any third country laws, in Section 1603(b).

Thus, the FSIA identifies which entities qualify as an agent of the foreign state. This Court recognized as much in *Nelson*, citing "28 U.S.C. §§1603(a), (b) (term '"foreign state"' includes '"an agency or instrumentality of a foreign state"')" when acknowledging that "[t]here is no dispute here that Saudi Arabia, the hospital, and Royspec all qualify as 'foreign state[s]' within the meaning of the Act." 507 U.S. at 356. This is confirmed in *Bancec*, where "the Cuban Government's exclusive agent in foreign trade"

satisfied the definition of an "agency or instrumentality" of a "foreign state." 462 U.S. at 613-14, 619-21. No resort to common law of agency is needed because Congress has spoken in Sections 1603(a) & (b), which extend commercial activity "by the foreign state" to include acts by corporate entities under the state's control by virtue of majority ownership.[2]

B. In the Alternative, *Bancec*'s Test of Agency Should Govern.

In the alternative, *Bancec*, rather than loose invocations to the common law of agency, should dictate the scope of "commercial activity carried on in the United States by the foreign state," as other circuits have held. Focusing on the "alter ego" prong of *Bancec*'s agency test, the United States argues that *Bancec* identifies "one way in which an entity's actions may be attributed to a foreign state," but that the test is not "exclusive." *See* U.S. Br. 12. But that ignores the other agency standard enunciated in *Bancec* "where a corporate entity is so extensively controlled by its owner that a relationship of principal

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[2] The United States in *Nelson* urged review of the court of appeals' decision as "not anchored in the statutory text" and "ignor[ing] the precise language of this carefully drafted statute." *See* Brief for the United States as Amicus Curiae, *Nelson*, 1992 WL 12012040 at *9, 13. "The FSIA's definitions provide pertinent guidance in determining whether a foreign state has carried on a commercial activity in the United States." *Id.* at *13. Here, the Ninth Circuit's test disregards the definition of agency altogether.

and agent is created." 462 U.S. at 629. The D.C. and Fifth Circuits have recognized *Bancec* as dictating the parameters of the agency inquiry for purposes of the commercial activity exception. *See Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 847-50 (D.C. Cir. 2000) (relying on *Bancec*'s "control" requirement in determining whether an agency relationship existed for purposes of the commercial activity exception); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533-37 (5th Cir. 1992).[3] The Ninth Circuit conflicts with these circuits since it refused to apply *Bancec* as the standard. *See* App. 20-21. In the process, it also disregarded the "control" element that the United States has identified as fundamental to the agency inquiry, stating that "[t]he day-to-day control inquiry under *Bancec* makes no sense here." App. 21. Review is required to resolve this circuit split and clarify the extent to which *Bancec* delimits which common law agency factors, such as control, are relevant for purposes of the commercial activity exception.

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[3] The Fifth Circuit in *Dale v. Colagiovanni*, 443 F.3d 425, 429-30 (5th Cir. 2006), cited by the United States, refused to apply *Bancec* when "*apparent authority*" was alleged. *Dale* is inapposite because RPE's actual authority is at issue. App. 15 (Ninth Circuit held that "[a]s long as the agent or subagent acts with actual authority, those acts can be imputed to the foreign state.").

C. This Case is an Appropriate Vehicle Compelling Review Now.

Although the United States argues that "the fact-specific question whether RPE acted as petitioner's agent would not merit this Court's review," U.S. Br. 13, the Ninth Circuit's holding is not fact-specific. It is a bright-line rule holding foreign state-operated commercial carriers liable to suit in the United States when a ticket is sold domestically, without regard for the FSIA's plain text or the requirement of "control" fundamental to *Bancec*. Review is compelled to correct the Ninth Circuit from, again, using common law agency principles to improperly expand federal jurisdiction over foreign entities, this time foreign states. *Daimler AG*, 134 S. Ct. at 759, 763.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

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AMICUS CURIAE BRIEF

No. 13-1067

In the Supreme Court of the United States

OBB PERSONENVERKEHR AG, PETITIONER

v.

CAROL P. SACHS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTIONS PRESENTED

1. Whether common-law agency principles may be used to determine whether the acts of a separate entity are attributable to a foreign state for purposes of the commercial-activity exception of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.*, which gives U.S. courts jurisdiction over claims that are "based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. 1605(a)(2).

2. Whether respondent's claims are "based upon" commercial activity carried on in the United States.

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In the Supreme Court of the United States

No. 13-1067

OBB PERSONENVERKEHR AG, PETITIONER

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CAROL P. SACHS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

This case concerns the commercial-activity exception of the Foreign Sovereign Immunities Act of 1976 (FSIA or the Act), 28 U.S.C. 1330, 1602 *et seq.*, which gives U.S. courts jurisdiction over an action against a foreign sovereign "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2). At the Court's invitation, the Solicitor General filed an amicus brief on behalf of the United States at the petition stage of this case.

STATEMENT

1. The FSIA establishes "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488

(1983). Section 1604 provides that a foreign state is "immune from the jurisdiction of the courts of the United States" unless the suit falls within one of the Act's exceptions to immunity. 28 U.S.C. 1604; see 28 U.S.C. 1330. The "commercial activity" exception, which is at issue in this case, provides in relevant part that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2); see 28 U.S.C. 1603(d) and (e).[1]

Section 1603(a) defines a "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined by subsection (b)." 28 U.S.C. 1603(a). Subsection (b) then defines an "agency or instrumentality of a foreign state" as "any entity" that is (1) a "separate legal person"; (2) "an organ of" or majority-owned by "a foreign state or political subdivision thereof," and (3) "neither a citizen of a State of the United States * * * nor created under the laws of any third country." 28 U.S.C. 1603(b).

2. a. Petitioner OBB Personenverkehr AG (OBB) operates passenger rail service in Austria. It is wholly owned by OBB Holding Group, a joint-stock company created by the Republic of Austria and wholly owned by the Austrian Federal Ministry of Transport, Innovation, and Technology. Petitioner is a member of the Eurail Group, an association responsible for marketing and selling Eurail passes, which authorize

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[1] The Act also includes several other exceptions to immunity, including a tort exception. See, *e.g.*, 28 U.S.C. 1605(a)(5).

passenger transit on the railways of member countries. Pet. App. 5.

Respondent is a California resident who purchased a Eurail pass over the Internet from Rail Pass Experts (RPE), a travel agent in Massachusetts. Pet. App. 5, 44. In April 2007, respondent presented her Eurail pass to petitioner in Innsbruck, Austria, to purchase a couchette reservation on a train traveling from Innsbruck to Prague. *Id.* at 6. When attempting to board the train, respondent fell and suffered injuries that ultimately required amputation of both her legs above the knee. *Ibid.*

b. Respondent sued petitioner in the District Court for the Northern District of California, asserting claims for negligence, strict liability for design defects and failure to warn of design defects, and breach of implied warranties of merchantability and fitness. Pet. App. 6. The complaint alleges that petitioner moved the train while respondent was attempting to board; provided an unsafe space for boarding because of a gap between the train and platform; failed to warn respondent of that gap; and did not supervise the boarding process. J.A. 14-18.

The district court dismissed the suit for lack of subject-matter jurisdiction under the FSIA. Pet. App. 101-111. The court concluded that the FSIA's commercial-activity exception to immunity did not apply because petitioner itself had not engaged in commercial activity in the United States and RPE's sale of the Eurail pass could not be attributed to petitioner. *Id.* at 108-109.[2]

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[2] Respondent did not contest that petitioner qualified as an agency or instrumentality of Austria. *Id.* at 104 n.1.

3. A panel of the court of appeals affirmed. Pet. App. 67-85. The court then granted rehearing en banc and reversed the district court's dismissal of the action. *Id.* at 1-66. The en banc court held that respondent's claims are "based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. 1605(a)(2), and that petitioner therefore is not immune from suit. Pet. App. 40-41.

a. The court of appeals first held that a foreign state may "carr[y] on" commercial activity in the United States within the meaning of Section 1605(a)(2) if the state acts through an entity whose actions are attributable to the foreign state "[u]nder traditional agency principles," so long as the agent (or subagent) was acting with actual authority. Pet. App. 15. The court concluded that "RPE is a subagent of [petitioner] through Eurail Group," and that because of that agency relationship "RPE's act of selling the Eurail pass to [respondent] within the United States can be imputed to [petitioner] as the principal." *Id.* at 18.

The court of appeals rejected petitioner's argument that before an entity's conduct may be attributed to a foreign state, the entity must satisfy Section 1603(b)'s definition of "agency or instrumentality." Pet. App. 21-30. The court explained that Section 1603(b) "defines what type of entity can be considered a foreign state for purposes of claiming sovereign immunity," but does not address the situations in which an entity's acts can be attributed to the foreign state. *Id.* at 22; see *id.* at 22-23.

b. The court of appeals next concluded that respondent's claims are "based upon" petitioner's commercial activity in the United States. Pet. App. 32-40. The court explained that this Court held in *Saudi*

Arabia v. *Nelson*, 507 U.S. 349 (1993), that "based upon" is "read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief." Pet. App. 32-33 (quoting *Nelson*, 507 U.S. at 357). The court further explained that, under Ninth Circuit precedent, a claim is "based upon" commercial activity if "an element" of the claim consists of commercial activity carried on in the United States, or if the commercial activity in the United States is an "essential fact" that the plaintiff must prove in order to establish an element of her claim. *Id.* at 33, 35 (emphasis omitted). The court concluded that California law applies to respondent's claims, *id.* at 34 n.14, and that the sale of the Eurail pass, which occurred in the United States, was an essential fact for purposes of those claims, *id.* at 33-40.

c. Judge O'Scannlain, joined by Chief Judge Kozinski and Judge Rawlinson, dissented. Pet. App. 42-61. The dissenting judges reasoned that an entity's actions may be attributed to a foreign state only if the entity's separate form should be disregarded under *First National City Bank* v. *Banco para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*Bancec*), and that respondent had not satisfied that standard. Pet. App. 45-58. They also concluded that respondent's strict-liability claims are not "based upon" the sale of the Eurail pass because those claims do not require proof of a transaction. *Id.* at 58-61.

Chief Judge Kozinski, in a separate dissent, concluded that none of respondent's claims are "based upon" commercial activity carried on in the United States because they all arose "from events that transpired entirely in Austria." Pet. App. 62; see *id.* at 65 (stating that suit against respondent in the United

States "makes as much sense as forcing Mrs. Palsgraf to litigate her case in Vienna"). In his view, the majority's "broad interpretation of the 'based upon' requirement" was inconsistent with this Court's decision in *Nelson* and would permit plaintiffs "to manufacture jurisdiction through artful pleading." *Id.* at 62-63.

SUMMARY OF ARGUMENT

The commercial-activity exception of the FSIA provides, in relevant part, that a foreign state shall not be immune from the jurisdiction of U.S. courts "in any case * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2). This case presents two questions arising from that provision: first, whether a foreign state can "carr[y] on" commercial activity in the United States by means of agents who act on behalf of the state; and second, whether a claim is "based upon" commercial activity in the United States if a single element of the claim (or fact necessary to establishing that element) consists of such activity. The court of appeals correctly answered the first question in the affirmative, but erred with respect to the second question by concluding that the claims at issue in this case satisfy the "based upon" requirement.

A. The court of appeals correctly held that a foreign state may be found to have "carried on" commercial activities in the United States when it has employed an entity to act as its agent in conducting those activities. Like a private party, a foreign state that employs an agent to accomplish commercial ends in the United States has reached into this country to act as a participant in the marketplace. The control that a principal has over an agent means that such a

state is effectively taking actions in the United States commercial market itself—that is, "carr[ying] on" commercial activity. Applying traditional agency-law principles to give content to the phrase "carried on" thus furthers Congress's purpose in the FSIA of ensuring that foreign states are subject to suit when they act in a commercial manner. Were the rule otherwise, a state could conduct all manner of commercial activities in the United States through its agents, and thereby obtain significant benefits, while maintaining immunity from suit in this country if those activities caused injury.

Petitioner's contrary arguments lack merit. Petitioner mistakenly asserts that 28 U.S.C. 1603(b), which defines an "agency or instrumentality of a foreign state," describes the only set of entities whose acts can be attributed to a foreign state for purposes of assessing whether the foreign state has "carried on" commercial activity in the United States under Section 1605(a)(2). Section 1603(b) "defines what type of entity can be considered a foreign state for purposes of claiming sovereign immunity" in its own right, Pet. App. 22, but does not speak to when and how a non-immune entity's acts can be attributed to the foreign state. Petitioner also incorrectly contends that such attribution is proper only if an entity's separate juridical status should be disregarded under this Court's decision in *First National City Bank* v. *Banco para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*Bancec*). In explaining that an entity "extensively controlled" by a foreign state may be the state's alter ego and therefore an agent of the state for all purposes, *id.* at 629, *Bancec* identified one way in which an entity's actions could be attributed to a

foreign state. The decision does not, however, address how to determine whether a foreign state has "carried on" commercial activity through agents only for a particular purpose.

B. The court of appeals held that an action is "based upon" commercial activity in the United States if "*an element* of [the plaintiff's] claim consists in conduct that occurred in commercial activity carried on in the United States," or if such activity is an "essential fact" to proving any element of the claim. Pet. App. 33 (citations omitted); *id.* at 35. It then concluded that each of respondent's claims is "based upon" the sale of the rail pass in the United States. See *id.* at 34-40. Those rulings are erroneous.

The text and purpose of Section 1605(a)(2) dictate that the "based upon" determination turns on identifying the gravamen—that is, the gist or essence—of a claim, an approach consistent with *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993). The phrase "based upon" refers to what is fundamental to a claim, amounting to its most important part—and a single element of a claim consisting of commercial activity in the United States, which may be at the periphery of the wrong allegedly suffered, does not necessarily qualify under that definition. Reading "based upon" to include a gravamen requirement ensures that foreign states are not subjected to suit in the United States on the basis of their sovereign (rather than commercial) acts. It also prevents U.S. courts from assuming jurisdiction over cases in which all or virtually all of the acts or omissions that are the subject of the parties' dispute took place abroad—a considerable expansion of the FSIA's limited exceptions to foreign-sovereign immunity.

In this case, the sale of the Eurail pass to respondent is a part of the chain of causation that led her to be present on the railway platform where she sustained injuries, but it is not the gravamen of her claims of negligence, strict liability, and breach of implied warranty. Rather, those claims all center around distinct tortious acts and resulting injuries that allegedly occurred outside the United States. Thus, just as in *Nelson*, it is those alleged bad acts, "and not the * * * commercial activities that preceded their commission," that "form the basis for the [plaintiff's] suit" for purposes of the FSIA. 507 U.S. at 358.

ARGUMENT

A. The Court Of Appeals Correctly Held That A Foreign State May Carry On Commercial Activity In The United States Through An Agent Acting On Its Behalf

1. The FSIA's commercial-activity exception provides in relevant part that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2); see 28 U.S.C. 1603(e) (defining latter phrase as commercial activity "carried on by such state and having substantial contact with the United States"). The exception is designed to ensure that when a foreign state acts as an "every day participant[]" in the marketplace—in other words, when the state engages in commercial ventures of the sort that private parties undertake—plaintiffs may seek judicial resolution of any resulting "ordinary legal disputes." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6-7 (1976) (*House Report*); *id.* at 17 (examples of disputes that would fall within exception include "business

torts occurring in the United States"); see generally *Republic of Arg.* v. *Weltover, Inc.*, 504 U.S. 607, 614-615 (1992).

Private parties often engage in commercial activities with the assistance of agents acting on their behalf. Because an agent is subject to the direction and control of the principal, the agent is able to "act for or in place of" the principal on matters within the scope of the agency as if the principal itself were engaging in the act. *Black's Law Dictionary* 72 (9th ed. 2009) (*Black's*) (second meaning of "agent"); see *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 392-393 (1982) (quoting 1 Restatement (Second) of Agency § 1(1) (1958)).

As a result, common-law agency principles are routinely applied in private commercial disputes. For purposes of both jurisdiction and liability, agency principles may provide a basis for attributing conduct to a principal who directed the activity at issue. See *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 759 n.13 (2014) (explaining that acts of an agent may be imputed to the principal for purposes of exercising specific jurisdiction); see also 1 Restatement (Third) of Agency § 1.01 cmt. c (2006). Such attribution is particularly common when the principal is a corporation: because "the corporate personality * * * is a fiction," such an entity "can act only through its agents." *Daimler AG*, 134 S. Ct. at 759 n.13 (citations omitted); see, *e.g.*, *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316-317 (1945).

Congress would have expected traditional agency-law principles to play a similar role in determining when a foreign state has undertaken commercial activities that subject it to suit. Foreign states, like private

actors, often engage in commercial activities by employing entities under their control to enter into and execute transactions. See *Maritime Int'l Nominees Establishment* v. *Republic of Guinea*, 693 F.2d 1094, 1105 (D.C. Cir. 1982) (discussing "the realities of modern commercial undertakings"), cert. denied, 464 U.S. 815 (1983). Indeed, like corporations, foreign states can act only through agents of one sort or another. See Pet. App. 23. When a foreign state uses agents to accomplish its commercial ends, the state is acting as an "every day participant[]" in the marketplace. *House Report* 7. And by virtue of the state's control over the agent, the state is effectively taking actions in the United States commercial market itself—that is, "carr[ying] on" commercial activity. 28 U.S.C. 1605(a)(2); see *The Random House Dictionary of the English Language* 319 (2d ed. 1987) (defining "carry on" as "to manage; conduct").

Applying agency-law principles to determine when a foreign state has "carried on" commercial activity thus furthers Congress's purpose of ensuring that foreign states are subject to suit when they act in a commercial manner. See *Maritime Int'l*, 693 F.2d at 1105; see also *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 372-373 (1993) (Kennedy, J., concurring in part and dissenting in part) (attributing to Kingdom of Saudi Arabia actions of private entity that "acted as the [Kingdom's] exclusive agent for recruiting employees" in the United States); U.S. Amicus Br. at 14 n.8, *Nelson*, *supra* (No. 91-522). If the acts of an agent were not attributed to a foreign state when assessing whether the requirements of Section 1605(a)(2) are met, then a state could conduct extensive commercial activities in the United States through its agents, and

could reap significant benefits from those activities, without ever subjecting itself to suit in this country.

The *House Report*'s discussion of a different (but overlapping) prong of the commercial-activity exception, which denies immunity for "act[s] performed in the United States in connection with a commercial activity of the foreign state elsewhere," 28 U.S.C. 1605(a)(2), reinforces the conclusion that Congress expected that foreign states could be subject to suit as a result of their agents' acts. The *House Report* (at 19) explains that "a representation in the United States by an agent of a foreign state" could constitute an "act performed" by a foreign state.

Exercising jurisdiction over a foreign state that has "carried on" commercial activity through an agent is also consistent with international practice. Cf. 28 U.S.C. 1602 (referring to immunity "[u]nder international law"); *Bancec*, 462 U.S. at 623. The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts provide that "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." G.A. Res. 56/83, Pt. 1, ch. II, art. 8, U.N. Doc. A/RES/56/83, at 3 (Jan. 28, 2002). The United States expressed support for an earlier, materially similar draft article. State Responsibility: Comments and observations received from Governments, U.N. Doc. A/CN.4/488, at 41 (Mar. 25, 1998).

Thus, the use of common-law agency principles to make the "carried on" determination gives content to the FSIA's plain text in a manner that is consistent

with "articulated congressional policies" and "internationally recognized" legal doctrine. *Bancec*, 462 U.S. at 623, 630, 633-634; see *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 473-478 (2003) (relying on "elementary principles of corporate law" to construe 28 U.S.C. 1603(b)(2), which refers to ownership of majority of "shares or other ownership interest"); see generally *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991). All of the courts of appeals to have addressed the issue have agreed with that conclusion.[3]

2. Petitioner's arguments against applying traditional agency principles lack merit.

a. Petitioner primarily argues (Br. 38-46, 50) that an entity's acts may be considered acts of the foreign state only if the entity falls within the statutory definition of an "agency or instrumentality of a foreign state" in 28 U.S.C. 1603(b). That argument misses the mark. Section 1603(b) does not speak to the question of how an entity that *is* a "foreign state" under that definition can "carr[y] on" commercial activities in the United States for purposes of Section 1605(a)(2).

That conclusion is apparent from the statutory text. Section 1603(a) provides that a "foreign state" includes the state itself, its political subdivisions, and any "agency or instrumentality" of the state "as defined in subsection (b)." 28 U.S.C. 1603(a). Section 1604 then provides that a "foreign state" is presumptively "immune from the jurisdiction of the [U.S.] courts," 28 U.S.C. 1604, and Section 1605 provides

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[3] See, *e.g.*, *BP Chems. Ltd.* v. *Jiangsu Sopo Corp.*, 285 F.3d 677, 682-686 (8th Cir.), cert. denied, 537 U.S. 942 (2002); *Transamerica Leasing, Inc.* v. *La Republica de Venezuela*, 200 F.3d 843, 849-850 (D.C. Cir. 2000); *Arriba Ltd.* v. *Petroleos Mexicanos*, 962 F.2d 528, 534-536 (5th Cir.), cert. denied, 506 U.S. 956 (1992).

that a "foreign state shall not be immune from the jurisdiction of the courts of the United States" in specified circumstances, 28 U.S.C. 1605. Section 1603(b), by defining agencies and instrumentalities to include "separate legal person[s]" that are organs of the state (or majority-controlled by the state) and are not citizens of the United States, extends those immunity provisions to such entities in their own right. See, *e.g.*, *House Report* 15 (stating that "agency or instrumentality" definition determines which entities are presumptively "entitled to sovereign immunity").

Nothing in Section 1603(b) suggests, however, that it addresses the distinct issue of whether the conduct of an entity that is not an agency or instrumentality of a foreign state may nonetheless be attributed to a foreign-state defendant for purposes of determining whether the state has "carried on" commercial activity in the United States under Section 1605(a)(2). The operative question is not what qualifies as a "foreign state"; no one would argue that RPE, the entity that sold the Eurail pass in this case, would somehow be entitled to foreign sovereign immunity were it sued in connection with that sale. Rather, the question is what it means for a foreign state to "carr[y] on" commercial activities, and whether the acts of someone acting on behalf of the foreign state should be deemed to be the state's own acts in assessing whether the state has reached into this country as a commercial participant. As to that question, Section 1603(b)—which does not purport to define the universe of entities that may serve as an "agent" of a foreign state, rather than an "agency" in the sense of being a governmental body in its own right, see Pet. Br. 48—is

simply beside the point. See Pet. App. 24.[4] Petitioner in fact never attempts to define "carried on"; indeed, in quoting or paraphrasing the language of Section 1605(a)(2), petitioner often omits that phrase altogether. See, *e.g.*, Pet. Br. 38-39.

Perhaps recognizing that the FSIA does not contain any provision that would "displace common-law agency principles * * * for purposes of assessing commercial activity," Pet. App. 24, petitioner relies (Br. 46-50) on the Restatement (Second) of Foreign Relations Law § 169 (1965) to contend that at the time the FSIA was enacted, international law would have attributed to a foreign state the acts of individual agents but not the acts of non-governmental entities serving as agents. That reliance is misplaced. The cited Restatement provision does not preclude the attribution of the acts of such entities to a foreign state, and there is no basis in international law for drawing fine distinctions in this context between acts of individual agents and acts of agents that have a corporate form. Moreover, by its own terms, the cited Restatement provision does not "relate to [a foreign state's] responsibility arising out of conduct occurring" outside the territory or jurisdiction of the state itself. *Id.* § 164 cmt. a; see *id.* § 169.

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[4] For the same reason, this Court's decision in *Samantar* v. *Yousuf*, 560 U.S. 305 (2010), cited in Pet. Br. 43-46, is not instructive here. *Samantar* interpreted the definition of "agency or instrumentality" to exclude individual foreign officials and held that the FSIA does not govern the question of their immunity. See 560 U.S. at 314-322. That decision did not address when a foreign state may have "carried on" activities through the actions of individuals or entities acting on the state's behalf.

The lack of support for petitioner's reading of Sections 1603(b) and 1605(a)(2) is not surprising, because that reading would create untenable results. Most notably, it would allow foreign states engaging in commercial activity in the United States to shield themselves from any exposure to litigation in U.S. courts by the expedient of acting through U.S. entities, which, by definition, are not "agenc[ies] or instrumentalit[ies]" of a foreign state. 28 U.S.C. 1603(b); see Pet. App. 23-27. Such an outcome would be inconsistent with the FSIA's purpose of ensuring that U.S. persons have recourse against a foreign state that engages in commercial activity in the United States.[5]

b. Petitioner argues in the alternative (Br. 50-55) that this Court's decision in *Bancec* should guide the inquiry into whether an entity's actions should be attributed to a foreign state. In *Bancec*, the Court observed that under principles common to both federal and international law, where a corporation is "so extensively controlled by its owner that a relationship of principal and agent is created," or where respecting the separate status of that corporation would otherwise "work fraud or injustice," that separate status

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[5] In addition, petitioner's interpretation apparently would automatically attribute to a foreign state itself commercial activities undertaken by a juridically separate agency or instrumentality that meets the Section 1603(b) definition. See Pet. Br. 46-49. That result would disregard this Court's admonition in *Bancec* "that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." 462 U.S. at 626-627; see pp. 17-18, *infra*. The commercial activities of juridically separate agencies and instrumentalities generally should not be attributed to the state absent an agency or alter-ego showing. See *Bancec*, 462 U.S. at 628-633.

will be disregarded. 462 U.S. at 629-630. The Court applied similar equitable principles to conclude that an instrumentality of Cuba was responsible for Cuba's debts, because giving effect to that instrumentality's separate status to bar an offset would work an injustice. See *id.* at 613, 633-634.

Although the Court did not elaborate further on the principal-agent basis for disregarding corporate separateness, *Bancec* supports the conclusion that a principal-agency relationship is a proper basis for attribution here. Presumably the consequence of holding that a state instrumentality is "so extensively controlled" as to be an alter ego of the state under *Bancec* is that the instrumentality is treated as the state's agent for *all* purposes. 462 U.S. at 629; see *Transamerica Leasing, Inc.* v. *La Republica de Venezuela*, 200 F.3d 843, 848-849 (D.C. Cir. 2000). In that event, if the state's alter ego carries on commercial activities in the United States, the state itself would be considered to have carried them on as well.

But *Bancec* does not purport to define the exclusive circumstances in which the actions of an entity should be attributed to a foreign state, or to displace common-law agency principles when an independent entity acts on behalf of a foreign state for a *particular* purpose without the state "extensively controll[ing]" all of that entity's actions. There is no reason to think that the alter-ego showing necessary to make a controlled entity liable for the debts of the controlling state is the same showing necessary to conclude that the state has "carried on" the commercial activities in which it has provided for an agent to engage. See *Dale* v. *Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006) (*Bancec* inquiry "analytically distinct" from whether

state employed agent); see also Pet. App. 20-21, 28 n.12. *Bancec* therefore does not undermine the conclusion that a state has "carried on" commercial activity in the United States if it retains an agent to transact specific business here on its behalf and enjoys any benefits that flow from the agent's activities—even if the state and the agent have not merged their legal identities. See, *e.g.*, 1 Restatement (Third) Agency § 1.01 cmt. c (explaining that mere fact of "agency relationship" does not "merge[] an agent's distinct identity with the principal's").

c. Finally, petitioner suggests (Br. 55, 59) that use of common-law agency principles will lead to a lack of uniformity. We agree that a uniform rule is necessary here because of the foreign-policy implications of courts' interpretation of the FSIA in this area. See, *e.g.*, *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493 (1983). But the proper rule of decision is a federal one that yields a uniform result: relying on "the general common law of agency, rather than on the law of any particular State," gives meaning to the phrase "carried on" in Section 1605(a)(2) and therefore is part of the task of "statutory interpretation." *Burlington Indus.* v. *Ellerth*, 524 U.S. 742, 754-755 (1988); see, *e.g.*, *Meyer* v. *Holley*, 537 U.S. 280, 285-286 (2003) (using "traditional" agency rules in interpreting Fair Housing Act and citing similar cases interpreting other statutes). Thus, just as the Court in *Dole Food* pointed to "basic tenet[s]" of corporate law to interpret an FSIA provision, 538 U.S. at 474, courts can and do rely on basic tenets of agency law to resolve Section 1605(a)(2) "carried on" questions. See Pet. App. 18 (stating reliance on "traditional theories"); note 3, *supra*. But even if state law on agency

were applicable (in its own right, or borrowed as federal law), federal law would supply limiting principles—for instance, to prevent a finding of an agency relationship on such a minimal basis that the foreign state could not be said to have "carried on" the activities in which the "agent" engaged. Cf. *Bancec*, 462 U.S. at 622-623.[6]

B. The Court Of Appeals Erred In Holding That Respondent's Claims Are "Based Upon" Commercial Activity In The United States

1. a. To establish jurisdiction over a foreign state under the relevant clause of Section 1605(a)(2), a plaintiff must show that "the action is based upon" the state's commercial activity carried on in the United States. In *Nelson*, this Court held that the phrase "based upon" connotes "conduct that forms the 'basis,' or 'foundation,' for a claim." 507 U.S. at 357. The Court explained that the phrase "is read most naturally to mean those elements of a claim that, if proven,

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[6] The questions presented challenge only the court of appeals' (correct) decision to employ common-law agency principles; they do not assert that the court erred in applying those principles to the facts of this case. See Pet. i, 14-15. Petitioner's brief (*e.g.*, Br. 55) now adverts to those latter issues, but only under the rubric of the mistaken argument that the *Bancec* standard for "extensive[] control[]" should govern. It is, in fact, unclear whether the court below was correct in concluding that RPE acted as petitioner's agent. Pet. App. 18-20, 26; see U.S. Cert. Amicus Br. 13; cf. *Harby* v. *Saadeh*, 816 F.2d 436, 438-439 (9th Cir. 1987). The evidence in the record on the relationships among petitioner, Eurail Group, and RPE is fairly sparse, and the en banc majority did not discuss those relationships in any detail. The Court should make clear that an endorsement of the use of common-law agency principles does not constitute an endorsement of the specific way the court of appeals applied those principles here.

would entitle a plaintiff to relief under his theory of the case," and it cited with approval a decision describing the inquiry as focusing on "the gravamen of the complaint." *Ibid.* (quoting *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985)). The Court also cautioned that it "d[id] not mean to suggest that the first clause of [Section] 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state" carried on in the United States. *Id.* at 358 n.4.

The plaintiffs in *Nelson* were a husband and wife who sued Saudi Arabia and its state-owned hospital for intentional and negligent torts committed against the husband in Saudi Arabia, allegedly in retaliation for his reporting safety hazards at the hospital where he worked after being recruited and hired in the United States by the defendants. See 507 U.S. at 352-354. The Court held that the plaintiffs' suit was "based upon" the tortious acts committed in Saudi Arabia and not upon recruiting and hiring "activities that preceded the[] [torts'] commission." *Id.* at 358. It was not enough, the Court explained, that the recruiting and hiring activities were "connect[ed] with" or "led to the conduct that eventually injured the [plaintiffs]." *Ibid.* As the Court stated, the suit could not be "based upon" the defendants' earlier activities because "those facts alone entitle the [plaintiffs] to nothing." *Ibid.*

b. *Nelson* did not decide how to treat a claim that consists of both elements premised on commercial activity described in Section 1605(a)(2) and elements that fall outside that category. 507 U.S. at 358 n.4. Nevertheless, *Nelson*'s discussion of the meaning of "based upon" indicates the correct approach: one that looks to the "gravamen of the complaint." *Id.* at 357

(citation omitted). That calls for an inquiry into whether commercial activity carried on in the United States is the gist or essence of a claim, and not simply an analysis of whether an essential fact or single element of the claim turns on the existence of such activity. See U.S. Amicus Br. at 15 & n.10, *Nelson* (No. 91-522) (court should identify "fundamental ingredient" of the cause of action); *Black's* 770 (defining "gravamen" as "substantial point or essence of a claim, grievance, or complaint").

The "gravamen" approach is well supported by the text and purpose of Section 1605(a)(2). As relevant here, the phrase to "base upon" means "to use as a base or basis for," and the noun "base" means "the fundamental part of something: basic principle." *Webster's Third New International Dictionary of the English Language* 180 (1976) (definition 2 of verb "base"; definition 3a of noun "base"); see *Webster's New Twentieth Century Dictionary of the English Language* 154 (2d ed. 1969) (definition 2 of noun "base": "the foundation or most important element"); 1 *The Oxford English Dictionary* 977 (2d ed. 1989) (*OED*) (definition 2.a. of noun "base": "*fig[urative]* [f]undamental principle, foundation, groundwork"; sense II of noun "base": "[t]he main or most important element or ingredient, looked upon as its fundamental part"); *Webster's New International Dictionary of the English Language* 225 (2d ed. 1958) (definition 4.a of "base": "[t]he main or chief ingredient of anything, viewed as its fundamental element or constituent"). *Nelson* relied on just such definitions to conclude that "based upon" in Section 1605(a)(2) refers to the "foundation" for a claim. 507 U.S. at 357 (citations omitted).

Although Section 1605(a)(2) asks what an "action" is "based upon," a claim-by-claim analysis is warranted. See *Nelson*, 507 U.S. at 362-363; see also *Keene Corp.* v. *United States*, 508 U.S. 200, 210 (1993); 28 U.S.C. 1330. Under such an analysis, there may be situations in which the foreign state's commercial conduct in the United States establishes a single element of or fact necessary to a claim, and that element or fact is so "[f]undamental" to the particular claim—amounting to its "most important" part, *OED* 977—that the commercial activity may be said to be the gravamen of the plaintiff's demand for relief. But the plain meaning of "based upon" precludes the conclusion that the requirement is met whenever the commercial activity in question constitutes *any* element or necessary factual predicate of the plaintiff's claim—even one that has little to do with the core wrong the plaintiff has allegedly suffered.

As *Nelson* explained, "[w]hat the natural meaning of the phrase 'based upon' suggests, the context confirms." 507 U.S. at 357. The two clauses of Section 1605(a)(2) that immediately follow the clause at issue in this case refer to acts performed "in connection with a commercial activity of the foreign state." 28 U.S.C. 1605(a)(2). Because "Congress manifestly understood there to be a difference between a suit 'based upon' commercial activity and one 'based upon' acts performed 'in connection with' such activity," the phrase "based upon" must be read to "call[] for something more than a mere connection with, or relation to, commercial activity." *Nelson*, 507 U.S. at 357-358; see *Transatlantic Shiffahrtskontor GmbH* v. *Shanghai Foreign Trade Corp.*, 204 F.3d 384, 390 (2d Cir. 2000), cert. denied, 532 U.S. 904 (2001). Looking at

the gravamen of a claim gives "based upon" considerably more force than a requirement of a "mere connection" with the relevant commercial activity. But looking only at a single element or necessary fact to decide whether the relationship between the claim and the commercial activity is sufficiently close is essentially equivalent to requiring only a connection between the two—as the court of appeals here acknowledged. See Pet. App. 12 (under single-element test "commercial activity that occurs within the United States must be connected with the conduct that gives rise to the plaintiff's cause of action"); *id.* at 33.

Finally, the purposes of the FSIA and the commercial-activity exception support a gravamen requirement. See 28 U.S.C. 1604. As this Court has recognized, that exception codifies the "restrictive" theory of sovereign immunity—a theory that makes a foreign state subject to suit for its commercial activities because engaging in those activities "do[es] not exercise powers peculiar to sovereigns," but rather "only those powers that can also be exercised by private citizens." *Weltover*, 504 U.S. at 614 (citation omitted); see *Nelson*, 507 U.S. at 363; 28 U.S.C. 1602. Were jurisdiction proper under the FSIA whenever a single fact necessary to make out a claim was linked to some commercial activity in this country, then the exception in Section 1605(a)(2) would enable suits in U.S. courts challenging activities that are best characterized as "state sovereign acts" rather than "state commercial and private acts." *Weltover*, 504 U.S. at 613. The gravamen requirement, in contrast, ensures that the suit is indeed "based upon" alleged wrongdoing that centers on a commercial activity.

Even in situations in which all of the relevant activities of the foreign state are commercial ones, reading "based upon" to call for an examination of the gravamen of the claim ensures a meaningful linkage between the United States and an action over which U.S. courts may exercise jurisdiction. See 28 U.S.C. 1330, 1605. The commercial-activity exception supplies a territorial basis of jurisdiction. Accordingly, each of the exceptions in Section 1605(a) calls for a tie to the United States, so as to avoid inserting this Nation's courts into disputes that are appropriately resolved elsewhere—an intrusion that may raise delicate questions of foreign relations when a foreign sovereign is the defendant. Cf. *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664-1665 (2013); see generally *Republic of Phil.* v. *Pimentel*, 553 U.S. 851, 865 (2008); *National City Bank* v. *Republic of China*, 348 U.S. 356, 362 (1955).[7] Too broad an interpretation of "based upon" would attenuate that tie, avoiding a significant jurisdictional limitation imposed by Congress and creating a serious risk that courts would assume jurisdiction over cases in which all or virtually all of the acts or omissions that are the subject of the parties' dispute took place abroad.[8]

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[7] Indeed, the requirement in Section 1605(a)(2) that a plaintiff's claim be "based upon" the foreign state's commercial conduct in the United States arguably requires a closer nexus to the United States than is required to find that a plaintiff's suit "aris[es] out of or relate[s] to the defendant's contact with the forum" in the specific-jurisdiction context. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 n.8 (1984).

[8] Although the legislative history of the Act does not directly address the meaning of "based upon," see *Nelson*, 507 U.S. at 357, that history points in the same direction. The *House Report* explains with respect to the second clause of Section 1605(a)(2),

c. In ruling that the "based upon" requirement is satisfied whenever the relevant commercial activity constitutes a single element of a claim or a necessary fact in establishing that element, the Ninth Circuit made no attempt to examine the text or purpose of the FSIA. See Pet. App. 32-33. Rather, that ruling appears to be derived solely from an over-reading of *Nelson*.

In the decision below (and the prior Ninth Circuit decisions on which the majority relied), the court of appeals focused on *Nelson*'s statement that "based upon" is "read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under [its] theory of the case." 507 U.S. at 357; see Pet. App. 32-33. But *Nelson*'s reference to "elements" does not suggest approval of the single-element test the court below adopted—particularly in light of *Nelson*'s reservation of the issue of how to treat a case in which certain elements of a claim are based on qualifying commercial activity and other elements are not. See 507 U.S. at 358 n.4. In addition,

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which deprives a foreign state of immunity if "the action is based * * * upon an act performed in the United States in connection with" the state's commercial activity "elsewhere," 28 U.S.C. 1605(a)(2), that "the acts (or omissions) encompassed * * * are limited to those which in and of themselves are sufficient to form the basis of a cause of action," *House Report* 19. That can only be a reference to the "based upon" language, which applies to all three clauses of Section 1605(a)(2) and therefore should be interpreted to mean the same thing with respect to each. See *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 342 (1994). The limitation set forth in the *House Report* demonstrates Congress's understanding that a claim cannot be "based upon" an activity if—far from being "sufficient" in itself to create a cause of action—the activity is tangential to the wrongdoing alleged.

as Chief Judge Kozinski explained in his en banc dissent, the suggestion in *Nelson* that "a claim *can* be based upon commercial activity even if proving that activity [will not] establish *every* element of the claim" cannot be transmuted into "an endorsement of the converse proposition—that a claim *is* based upon commercial activity so long as proving that activity will establish at least *one* element of the claim," no matter which one. Pet. App. 63.[9]

The test adopted below not only departs from the text and purpose of the FSIA, but also would entail untoward consequences. Under that erroneous test, the scope of the commercial-activity exception would depend on the artfulness of a plaintiff's pleadings rather than on the nature of the sovereign's acts. If one claim permits qualifying commercial activity to be shoehorned into a single "element" of the claim while another does not, and both claims are based on the same underlying conduct, then the FSIA would—on the Ninth Circuit's view—permit the first claim to proceed while barring the second.

That approach would encourage the kind of gamesmanship that this Court disapproved in *Nelson*, which refused to give "jurisdictional significance" to a "feint of language" whereby "a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn." 507 U.S.

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[9] *Nelson* cited *Santos* v. *Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991), which stated a single-element test. 507 U.S. at 357; see Pet. App. 33. The statement from *Santos* that *Nelson* quoted did not embody that test, however. And because *Santos* concluded that no element of the claim at issue was based upon U.S. commercial activity, see 934 F.2d at 891, 894, the result would have been the same under the gravamen approach.

at 363; cf. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 702 (2004) (criticizing "repackag[ing]" of claims to manipulate application of foreign-country exception to waiver of immunity in Federal Tort Claims Act).[10] It would raise the possibility that the immunity analysis in very similar cases—even ones arising from essentially the same set of facts—would have different outcomes, creating uncertainty and a perception of unequal treatment in the "vast external realm." *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936). And it would create the risk that the United States would be subject to similar arbitrary rules when foreign courts evaluate whether jurisdiction over a claim against this country is proper. See *Boos* v. *Barry*, 485 U.S. 312, 323 (1988) (highlighting "concept of reciprocity").

2. An examination of the claims asserted in this case makes clear that respondent's claims are not "based upon" commercial activity in the United States.

The complaint alleges that petitioner provided an unsafe boarding area and permitted unsafe boarding procedures in Innsbruck, as a result of which respondent fell and was injured while she was attempting to board a train to Prague. See J.A. 14-18. The

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[10] Courts should be especially wary of such gamesmanship where—as here—a plaintiff's claim could fall within the scope of the tort exception to immunity if the requisite connection to the United States existed. See 28 U.S.C. 1605(a)(5) (covering claim for damages for "personal injury or death, or damage to or loss of property, occurring in the United States and caused by [a] tortious act or omission"); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). Otherwise, plaintiffs could use the commercial-activity exception to circumvent Section 1605(a)(5)'s strict territorial limitation.

complaint asserts claims of negligence; strict liability for defective railcars and platforms and a failure to warn of the defects; and a breach of implied warranties of merchantability and fitness relating to the railcars and the platform. See *ibid.* The only commercial activity in the United States attributed to petitioner was RPE's sale of her Eurail pass. But all of the allegedly tortious conduct occurred in Austria, after respondent purchased the pass and traveled to Europe.

While RPE's sale of the Eurail pass to respondent in the United States enabled respondent to use the pass in Innsbruck, the sale of the pass is not the "gravamen," or foundation, of respondent's suit. Respondent does not allege that the sale of the Eurail pass was itself wrongful, and this is not a breach-of-contract action based on her purchase of it. Rather, respondent alleges that the sale was a link in the chain of events that led her to be injured in Austria by petitioner's allegedly tortious activities in that country. As was true in *Nelson*, those alleged bad acts, "and not the * * * commercial activities that preceded their commission, form the basis for the [plaintiff's] suit." 507 U.S. at 358.

Assuming that California law applies (as the court below concluded, see Pet. App. 34), a detailed examination of the elements of respondent's claims confirms that common-sense conclusion.[11] First, the negligence

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[11] It is doubtful that the court below was correct in concluding that California law governs. Contrary to the court's assertion (Pet App. 34 n.14), the FSIA's provision that a non-immune foreign state "shall be liable in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 1606, does not indicate disregard for choice-of-law principles. See, *e.g.*,

claim centers around activity that took place in Austria rather than in the United States: petitioner's alleged failure to take sufficient care with respect to the condition of the platform and the boarding procedures in Innsbruck, and the injury that respondent says resulted from that failure. See J.A. 14-15. The focus of tort claims is ordinarily on the breach of a duty of care and on the resulting injury, rather than on the circumstances giving rise to the duty in the first instance.

The court below said that the sale of the pass was necessary to establish an element of the claim, reasoning that petitioner owed respondent "a duty of care because her purchase of the Eurail pass established a common-carrier/passenger relationship." Pet. App. 34; see *id.* at 35. Even if that were correct, that would not shift the gravamen of the claim away from petitioner's allegedly negligent acts at a particular train

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Barkanic v. *General Admin. of Civil Aviation of China*, 923 F.2d 957, 959-961 (2d Cir. 1991). The court's cursory choice-of-law analysis did not weigh all relevant factors or explain why California's interest outweighed Austria's, even though respondent was injured in Austria and her claims concern the adequacy of Austrian transportation facilities. See Pet. App. 34 n.14; cf. 1 Restatement (Second) Conflict of Laws §§ 6, 145 (1971); *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 70 (D.C. Cir. 2011), vacated on other grounds, 527 Fed. Appx. 7 (D.C. Cir. 2013). Still, in the court of appeals neither party addressed, for purposes of a "based upon" analysis, which jurisdiction's law should apply, Resp. C.A. Reply Br. 6-10; Pet. C.A. Br. 40-43; *id.* at 51-52 (briefly asserting in *forum non conveniens* argument that Austrian law governs), and petitioner has not challenged the Ninth Circuit's choice of law, see Pet. i; Pet. Br. 28-38. Accordingly, the issue may be deemed waived. Alternatively, if the Court chooses to remand for application of the correct "based upon" standard, the Court could instruct the Ninth Circuit to revisit the choice-of-law issue.

station in Austria and the injury that is claimed to be the consequence of those acts. But it is wrong even as a matter of California law. Respondent need not show that petitioner owed her the duty of heightened care associated with the common carrier/passenger relationship in order to prevail on a negligence claim; a rail carrier owes non-passengers a duty of ordinary care. See *Orr* v. *Pacific Sw. Airlines*, 257 Cal. Rptr. 18, 20-21 (Cal. Ct. App. 1989); *McGettigan* v. *Bay Area Rapid Transit Dist.*, 67 Cal. Rptr. 2d 516, 520, 522-524 (Cal. Ct. App. 1997). In addition, the pass itself did not create a common carrier/passenger relationship that gives rise to a heightened duty with respect to a tort claim. Under California law, that relationship is created when "one, intending in good faith to become a passenger, goes to the place designated as the site of departure at the appropriate time and the carrier takes some action indicating acceptance of the passenger as a traveler." *Orr*, 257 Cal. Rptr. at 21 (citation omitted); see *Grier* v. *Ferrant*, 144 P.2d 631, 633-634 (Cal. Dist. Ct. App. 1944) ("relationship is created when one offers to become a passenger, and is accepted as a passenger after he has placed himself under the control of the carrier"); see also 11A Cal. Jur. 3d *Carriers* § 143 (2007). Merely holding a ticket or a pass is neither sufficient, see *Orr*, 257 Cal. Rptr. at 21-22; see also *Simon* v. *Walt Disney World Co.*, 8 Cal. Rptr. 3d 459, 464-466 (Cal. Ct. App. 2004), review denied, Mar. 30, 2014, nor necessary, see *Grier*, 144 P.2d at 633; see also J.A. 15, 32, 40; see generally *Aschenbrenner* v. *United States Fid. & Guar. Co.*, 292 U.S. 80, 82-85 (1934).

Second, the strict-liability claims bear no relationship to the pass or its purchase. The complaint alleges

that "the railcars and boarding platform were defective in their design" and should have been accompanied by warnings, J.A. 16-17; the gravamen of those claims is outside the United States, where the allegedly defective items were designed, sold, and used, see *ibid.*, and where any warnings about the items would have been provided. With respect to the defects, the court below confused the issue by apparently considering the sale of the pass to be a necessary element of a strict-liability claim. See Pet. App. 38-39 & n.17. That was wrong as a matter of California law, under which strict liability for defective products exists regardless of whether the injured party is a purchaser, a lessee, or simply a bystander. See, *e.g.*, *Price* v. *Shell Oil Co.*, 466 P.2d 722, 725-726 (Cal. 1970) (disagreeing with Restatement (Second) of Torts § 402A); *Elmore* v. *American Motors Corp.*, 451 P.2d 84, 88 (Cal. 1969). Moreover, to the extent that a sale of the allegedly defective product to *someone* is required in order for strict liability to attach, the sale of the pass would not qualify, since the pass is not the thing that is said to be defective. See J.A. 16. With respect to the need for a warning, respondent has not alleged that the pass should have warned about the conditions on one specific platform in one particular city in Europe. If any warning was needed, it surely was one that should have been given in Innsbruck. See Pet. App. 88 (Bea, J., concurring in panel's judgment).

Last, the breach-of-implied-warranty claims are merely a way of restating the strict-liability claims in an attempt to make them sound in contract and thus link them to the pass. See *Greenman* v. *Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963). Just as in *Nelson*, the Court should not permit respondent to

invoke the commercial-activity exception through a "feint of language." 507 U.S. at 363. Under California law, implied warranties of merchantability and fitness attach to contracts to sell or supply goods, not contracts to provide services, see *Link-Belt Co.* v. *Star Iron & Steel Co.*, 135 Cal. Rptr. 134, 142 (Cal. Ct. App. 1976)—and a ride on a train falls into the latter category. See, *e.g.*, *Garcia* v. *Halsett*, 82 Cal. Rptr. 420, 422 (Cal. Ct. App. 1970) (defining "bailment"). Respondent is not truly complaining about a breach of any promise contained in her pass; she is complaining of distinct tortious actions allegedly taken by petitioner on an Austrian rail platform, and her claim is therefore not "based upon" commercial activity in the United States.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1330 provides:

Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

2. 28 U.S.C. 1602 provides:

Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments

rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

3. 28 U.S.C. 1603 provides:

Definitions.

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

4. 28 U.S.C. 1604 provides:

Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

5. 28 U.S.C. 1605 provides:

General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the for-

eign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or

employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime

lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that

the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

[(e), (f) Repealed. Pub. L. 110-181, div. A, title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.]

(g) LIMITATION ON DISCOVERY.—

(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the

court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) SUNSET.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE.—The Court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

6. 28 U.S.C. 1605A provides:

Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract a-

warded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph

(1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 161[illegible];

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

7. 28 U.S.C. 1606 provides:

Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

8. 28 U.S.C. 1607 provides:

Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

9. 28 U.S.C. 1608 provides:

Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed

receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment

shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

10. 28 U.S.C. 1609 provides:

Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

11. 28 U.S.C. 1610 provides:

Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution

of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) WAIVER.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) PROPERTY IN CERTAIN ACTIONS.—

(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state un-

der the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

12. 28 U.S.C. 1611 provides:

Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the

bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 13-1067

IN THE

Supreme Court of the United States

OBB PERSONENVERKEHR AG,
Petitioner,

v.

CAROL P. SACHS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE GOVERNMENTS OF THE KINGDOM OF THE NETHERLANDS AND THE SWISS CONFEDERATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

1) Whether it would be consistent with international law for a U.S. court to exercise extraterritorial jurisdiction against a foreign state-owned railway for an injury that was suffered abroad, based solely on the purchase of a ticket by a U.S. resident from a U.S.-based Internet seller.

2) Whether the Internet sale of a foreign service to a U.S. resident causes the service performed entirely abroad to become "commercial activity carried on in the United States" by a sovereign entity under the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. §1605(a)(2).

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INTERESTS OF THE *AMICI CURIAE*

The Governments of the Kingdom of the Netherlands and the Swiss Confederation (collectively "the Governments") are committed to the rule of law, and to the basic principles of international law that impose restraints on the assertion of jurisdiction by one state over civil actions against foreign state-owned entities.[1]

In the present case, the Court of Appeals for the Ninth Circuit held that an American plaintiff could bring suit in the United States against the foreign state-owned carrier for any accident in the foreign country, if she had bought a ticket from an agent in the United States before departing. According to the Governments, this exercise of extraterritorial jurisdiction would not be in accordance with well-established principles of international law.

The Governments have consistently opposed broad assertions of extraterritorial jurisdiction over alien persons arising out of foreign disputes with little, or no, connection to the United States. They are of the view that U.S. courts should take account of the jurisdictional constraints under international law when construing domestic statutes, as was highlighted by this Court in such cases as *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004)

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[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amici Curiae*, its members, and its counsel contributed monetarily to the preparation of submission of this brief. Counsel of Record for both the Petitioner and the Respondent received timely notice of *Amici Curiae's* intent to file this brief, and both the Petitioner and the Respondent have granted their consent to the filing of this brief.

("*Empagran*"), *Sosa v. Alvarez-Machain*, 543 U.S. 692 (2004) ("*Sosa*"), and *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) ("*Kiobel*").

This brief is intended to urge this Court to interpret the Foreign Sovereign Immunities Act ("FSIA") in conformity with the basic principles of jurisdictional restraint clearly recognized in international law and this Court's precedents.

STATEMENT OF THE CASE

On April 27, 2007, the Appellee Carol P. Sachs ("Ms. Sachs" or "the Plaintiff") was injured in Innsbruck, Austria when she fell while trying to board a Prague-bound train operated by Appellant OBB Personenverkehr AG ("OBB"), a corporation indirectly owned by the Republic of Austria. Petitioner's Appendix ("Pet. App.") at 101.

Ms. Sachs was travelling on a 4-day Eurail pass issued by Eurail Group C.I.E. ("Eurail Group"), a Netherlands-headquartered consortium of 30 European railroads (including OBB). *See* Pet. App. at 104-105. Eurail passes are special tickets sold only to people outside of Europe in order to allow them unlimited travel for a specified time period on regularly scheduled trains operated by any of the participating European railroads. Ms. Sachs, a California resident, had bought her Eurail pass over the Internet a month earlier from a Massachusetts-based travel agency called Rail Pass Experts ("RPE"), which was authorized to sell Eurail passes in the United States.

SUMMARY OF THE ARGUMENT

The exercise of jurisdiction by U.S. Courts over non-resident entities or persons should be in accordance with international law principles. The case at hand touches upon the international law principles of sovereign immunity on the one hand, and of the territorial limitations of jurisdiction on the other hand.

Because OBB is a foreign state-owned corporation, claims against it must be brought in accordance with the Foreign Sovereign Immunities Act ("FSIA"). The FSIA, reflecting the restrictive doctrine of sovereign immunity, allows actions against foreign states if they are based on commercial activities. However, in addition to this and in accordance with international law, there must be a sufficiently close connection to the United States in order to allow U.S. Courts to exercise jurisdiction. OBB has not engaged in any direct activities or contacts within the United States and the Plaintiff's claim is not based upon commercial activity by it in the United States. The Governments believe there is no basis for a U.S. District Court in California to exercise jurisdiction over the Austrian state-owned railway under these circumstances. The fact that the Plaintiff purchased her ticket on the Internet from the United States should not alter this analysis. Under no circumstances should the FSIA be construed as extending jurisdiction over foreign states in cases in which the exercise of extraterritorial jurisdiction would not be permitted if the defendant were a private party.

This case is important because it lies at the intersection of fundamental principles of international law and comity with modern business methods using Internet technology. State sovereignty and state

immunity are basic pillars of domestic and international law that are essentially based—in reciprocal terms—on respect for national jurisdiction. The Internet tends to generate random transactions from wherever is convenient, with increasingly less attention to the geographic sources and destinations of such traffic. In the Governments' view, the use of the Internet's modern business methods should not allow participants to circumvent basic legal principles governing jurisdiction and international relations among governments.

ARGUMENT

I. IT IS ESPECIALLY IMPORTANT THAT THE FOREIGN SOVEREIGN IMMUNITIES ACT BE CONSTRUED IN WAYS THAT ARE CONSISTENT WITH INTERNATIONAL LAW AND PRACTICE

A. Sovereign Immunity Is a Cornerstone of International Law

Sovereigns have historically granted each other immunity in their own courts as a way of reducing the risks of legal, diplomatic and even military conflicts. At heart, it is a concept of reciprocal respect among sovereigns; and, as such, it is closely related to the basic principle of international law that each sovereign nation is equal and entitled to prescribe laws and to adjudicate claims regarding those persons within its sovereign territory. *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825) ("No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another."). Furthermore, "the purpose

of sovereign immunity in modern international law is to promote the functioning of all governments by protecting a state from the burdens of defending law suits abroad which are based upon its public acts." *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987)(citing legislative history).

B. Both the United States and the Governments of the Netherlands and Switzerland Follow the Restrictive Theory of Sovereign Immunity in Line With International Law and Practice

It is hard to imagine a subject more fraught with political and diplomatic risk than for one sovereign to haul into its courts officers or entities of another sovereign engaged in official activities. Thus under "the classical or absolute theory of sovereign immunity" the bar was total: "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign."[2]

In the 20th century, as sovereign states became increasingly involved in running major commercial activities (including transportation companies, communications carriers, and financial institutions) which dealt with foreign nationals on a regular basis, the pressure began to rise for them to provide some form of legal redress for commercial disputes that resulted from these activities. This gave rise to what became known as the *restrictive theory* of foreign sovereign

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[2] *See* Letter from Jack B. Tate, State Department Acting Legal Adviser to the Attorney General, dated May 19, 1952, 26 State Dept. Bulletin 984-85 (1952) ("Tate Letter"), attached as Appendix 2 to this Court's opinion in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-716 (1976) ("*Dunhill*").

immunity, in which "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 487 (1983).

The restrictive theory is today recognized by a substantial majority of nations, including the *Amici*, and has been codified in major multilateral treaty regimes governing immunity. *See* European Convention on State Immunity, May 16, 1972, 1495 U.N.T.S. 182, 11 I.L.M. 470 (entered into force June 11, 1976) (hereinafter "European Immunities Convention").[3] *See also* United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38, 44 I.L.M. 803 (Dec. 2, 2004) (hereinafter "U.N. Immunities Convention").

This Court, referring to international developments, endorsed the restrictive theory a few months prior to the enactment of the FSIA in 1976:

> this approach has been accepted by a large and increasing number of foreign states in the international community. and. subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts.

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[3] *Available at* http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm. Both of the Amici Governments have ratified the European Convention. *See* Council of Europe, Treaty Office, European Convention on State Immunity, CETS No.: 074, *available at* http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=074&CM=&DF=&CL=ENG.

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 701-704 (1976) ("*Dunhill*"). Appended to the majority opinion were two detailed letters from the Legal Adviser at the Department of State to the Attorney General (dated May 19, 1952)[4] and the Solicitor General (dated November 26, 1975)[5] recounting in detail the evolution of U.S. and international history that had led the State Department to explicitly adopt the restrictive theory of sovereign immunity as Executive Branch policy in 1952. The State Department had explained that it was bringing the U.S. policy in line with quite a few other countries that had already adopted this theory—including Austria, Switzerland, and the Netherlands.[6]

The FSIA codified the restrictive theory of sovereign immunity already set out in the above-mentioned Tate Letter, meaning that "the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts and does not extend to suits based on its commercial or private acts. . "[7] The legislative history is clear that, in enacting the FSIA, Congress was seeking to bring the United States into line with international law as it was evolving from the actions of other leading countries on how they were dealing with legal questions caused by "commercial activities" of government-owned enterprises. *See Siderman de*

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[4] Tate Letter, *Dunhill*, 425 U.S. at 711-716.

[5] *See* Appendix 1 (Letter from Department of State Legal Adviser Monroe Leigh to the Solicitor General dated November 26, 1975) in *Dunhill*, 425 U.S. at 706-711.

[6] Tate Letter in *Dunhill*, 425 U.S. at 712-713.

[7] H.R. Rep. No. 94-1487, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605.

Blake v. Republic of Argentina, 965 F.2d 699, 706 (9th Cir. 1992).

II. IN CONFORMITY WITH INTERNATIONAL LAW AND COMITY, THE "COMMERCIAL ACTIVITIES" EXCEPTION IN §1605(a)(2) OF THE FSIA IS TERRITORIAL IN ITS TERMS

A. Restrictive Immunity As Codified in the FSIA Takes Geographical Limitations of Jurisdiction Into Account

A sovereign has always been free to allow suits in its own courts for breaches of contract, torts, or other civil wrongs committed by its officials or agents. This is simply a matter of domestic law, as it was when the United States first established the U.S. Court of Federal Claims in 1855.[8] Meanwhile, the international law doctrine on sovereign immunity has always had a different focus. It has been concerned about other sovereigns not allowing claims in their courts against a foreign sovereign.[9]

The FSIA allows actions to be brought against foreign states, but only if the requirements of 'commercial activities' and of a sufficiently close connection

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[8] "An Act to establish a Court for the Investigation of Claims against the United States", Act of February 24, 1855, c. 122, 10 Stat. 612.

[9] As stated in the legislative history, "Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state." H.R. Rep. No. 94-1487, at 8 (1976) *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606.

with the United States are fulfilled.[10] The goal of bringing greater certainty and fairness has led to the enactment of the "based upon a commercial activity carried on in the United States" proviso in Section 1605(a)(2) that is at issue in the current case. 28 U.S.C. § 1605(a)(2). The geographic limitation on this "commercial activity" exception enacted in the FSIA "denies jurisdiction to the courts of the United States unless the activity took place or had a direct effect in the United States." Restatement (Third) of Foreign Relations Law of the United States § 453, Reporters' Note 1 (1987) (hereinafter "Restatement (Third) Foreign Rel. Law").

Section 1603(e) of the Act provides a definition that a "'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such a state and *having substantial contact with the United States*." 28 U.S.C. § 1603(e) (emphasis added).

Interestingly, the FSIA was enacted at a time when foreign governments were increasingly raising concerns about extraterritorial exercises of U.S. civil jurisdiction against foreign commercial enterprises for their activities conducted outside the United States.[11] Thus, the risk of likely diplomatic difficulties may have been seen as flowing less from the "commercial

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[10] Sir Robert Jennings & Sir Arthur Watts, eds., *Oppenheim's International Law*, at 457-8 (9th ed. 1992) (emphasis added).

[11] William Laurence Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy*, 83 Harv. L. Rev. 579 (1970)(stating "The extraterritorial application of the Act to the activities of foreign corporations controlled by Americans frequently gives rise to conflicts with the laws and policies of the host country.").

nature" of a foreign government's activities, as from the geographic location of where they had taken place. At the time, the growing concern among foreign governments about what they regarded as unwarranted exercises of extraterritorial jurisdiction concerned private companies engaged in activities abroad, sometimes at the behest of the foreign government.[12] Such diplomatic risks are even more likely to become acute where the defendant is a governmental entity, rather than a private enterprise, engaged in "commercial" activities having no sufficiently close connection to the United States.

B. The FSIA Clearly Resolved the Issue of the Geographic Scope of the Restrictive Doctrine That Was Still Open in the United States Prior to Its Enactment

Acceptance of the restrictive doctrine in principle (as the United States had done since at least 1952) still left open two practical issues. The first was how to draw the line between what entities were "sovereign" and what were "commercial" activities. The second was whether and how the doctrine applied when the alleged "commercial activities" were conducted outside the United States.

Thus, less than a year before the passage of the FSIA, this Court held that the "act of state" doctrine did not supply a defense, even though the "commercial activity" had occurred in a foreign country (Cuba). *Dunhill*, 425 U.S. at 705-706.

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[12] Bruno Zanettin, *Cooperation Between Antitrust Agencies at the International Level* 50 (2002) ("[M]ost of those blocking statutes of general application were adopted in the 1970s, or beginning of the 1980s [T]hey are the direct result of the extraterritorial application of US antitrust [law].").

In enacting § 1605(a)(2), Congress effectively *reversed* the practical result of the *Dunhill* decision that had ignored geographic limitations when applying the restrictive theory. Thus, even if the activities were "commercial" (as the *Dunhill* majority had believed), they were not activities being "carried on in the United States" (as the dissenters had emphasized). *Dunhill*, 425 U.S. at 716-718, 726. The "commercial activities" issue would generate further clarification by this Court in *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) ("*Nelson*"), eighteen years later; and now the "carried on in the United States" limitation can be clarified by the decision in this case.

C. The FSIA Further Codified the Territorial Limitations of Jurisdiction As Developed in International Law and Practice and Is the Only Basis for Exercising U.S. Jurisdiction Over a Government-Owned Entity Such As OBB

The FSIA further codified territorial limitations on the exercise of jurisdiction over foreign states: it "prescribe[s] the necessary contacts which must exist before our courts can exercise personal jurisdiction."[13] As the Ninth Circuit stated in an earlier case:

> [N]othing in the legislative history [of the FSIA] suggests that Congress intended to assert jurisdiction over foreign states for events occurring wholly within their own territory. Such an intent would not be

[13] H.R. Rep. No. 94-1487, at 13 (1976) *reprinted in* 1976 U.S.C.C.A.N. 6604, 6612.

> consistent with the prevailing practice in international law. That practice is that a state loses its sovereign immunity for tortious acts only where they occur in the territory of the forum state.

McKeel v. Islamic Republic of Iran, 722 F.2d 582, 588 (9th Cir. 1983) (interpreting the FSIA in conformity with the European Immunities Convention).

Therefore, the oft-repeated dictum that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains", unless the act contains "express words or a very plain and necessary implication" to the contrary, is especially applicable the FSIA. *See Alexander Murray, Esq. v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). Thus, the *Charming Betsy* principle simply reinforces the concept that "commercial activity carried on in the United States" should have to be substantial, rather than incidental, and that the plaintiff's claim should have to be "based upon" such substantial U.S. activity.

This Court, having recognized in numerous cases that U.S. litigation against a foreign sovereign can be fraught with risks of conflict, has been very explicit that, "[t]he Foreign Sovereign Immunities Act provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (citation omitted).

D. This Case Offers the Court the Chance Put to Rest Any Lingering Uncertainties Left After Its 1993 Decision in *Saudi Arabia v. Nelson*

The *Nelson* case offers some useful parallels and left open some questions that should be clearly resolved here. 507 U.S. 349 (1993). As in the present case, *Nelson* involved an initial contract entered into in the United States followed by an alleged overseas tort. The plaintiff had been recruited in the United States by a clearly authorized agent for the Defendant sovereign to work in the Defendant's hospital in Saudi Arabia, where the alleged torts occurred at the hands of employees or agents of the State. Thus, there was a fairly clear U.S. "commercial" activity (i.e., the recruitment).

In *Nelson*, the "commercial activity" in the United States involved face-to-face negotiations and training. Yet only Justice Stevens thought the initial U.S. contracting was sufficient to support the Plaintiff's claim for the injuries that he had unmistakably suffered at the hands of the Defendant State. 507 U.S. at 377. Instead, the majority (in an opinion by Justice Souter), emphasized the "based upon" language in the statute:

> Congress manifestly understood there to be a difference between a suit 'based upon' commercial activity and one 'based upon' acts performed 'in connection with' such activity. The only reading of the former terms calls for *something more than a mere connection with, or relation to commercial activity*.

Id. at 358 (emphasis added). Thus, while the Defendant State was engaged in "commercial activity" in running a hospital, the majority ruled that the

Defendants' overseas tortious misconduct (i.e., arrest and torture) did not constitute "commercial activity" *Id.* at 361. Thus, the majority said that it "need not reach the issue of *substantial contact* with the United States." *Id.* at 356 (emphasis added). The Court also emphasized that, "[u]nder international law, a state or state instrumentality is immune except with respect to claims arising out of activities of the kind that may be carried out by a private person." *Id.* at 360 (quoting Restatement (Third) Foreign Rel. Law § 351).

Justice White's concurring opinion (joined by Justice Blackmun) focused directly on this geographic issue and shows the way the Governments respectfully believe this Court should proceed now. Even though he thought the overseas retaliation against an employee for whistle-blowing was "commercial activity", Justice White concurred in the judgment because this activity "was not 'carried on in the United States,'" as required by the FSIA. *Id.* at 364. He then added, "while these [prior recruiting activities] may well qualify as commercial activity in the United States, they do not constitute the commercial activity upon which respondents' action is based." *Id.*

Nelson stands for the proposition that the plaintiff's claim must be "based upon" commercial activity in the United States 28 U.S.C. § 1605(a)(2). This means that "the foreign state's commercial activity in the United States must be the basis of (i.e., a necessary element of) the plaintiff's claim." *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1133 (9th Cir. 2012). Here, even if OBB was deemed to have engaged in commercial activity in the United States, it is clear that Plaintiff's claim is not "based upon" her purchase of a ticket, which was not limited to travelling with OBB but allowed unlimited travel for a specified time

period on regularly scheduled trains operated by any of the participating European railroads. Instead, plaintiff's claim is based upon the injury she suffered in Austria. In other words, the causal link between the purchase of the ticket on the Internet in the United States before she left and the injury suffered at the Austrian train station is not sufficient to satisfy the 'based upon' requirement of the FSIA.

E. The Risks for International Relations From an Unwarranted Exercise of Extraterritorial Jurisdiction Is Particularly Acute When the Defendant is a Foreign Sovereign Entity

In *Kiobel*, *Empagran* and *Morrison*, this Court recently reemphasized a clear presumption against a cause of action created by a federal statute being construed to allow suit in U.S. courts by foreign plaintiffs for injuries suffered abroad. It emphasized the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 248 (2010) (quoting *EEOC v. Arabian American Oil Company*, 499 U.S. 244, 248 (1991) ("*Aramco*")). *See* also *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013). This "presumption against extraterritoriality" avoids the "serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *Empagran*, 542 U.S. at 165 (2004).

In the present case, as in *Aramco* and *Kiobel*, an American plaintiff is suing for injuries suffered abroad at the hands of a foreign corporation operating abroad—but this time the presumption should be even stronger because the Defendant is a foreign State.

Under no circumstances should the FSIA be construed as extending jurisdiction over foreign states in cases in which the exercise of extraterritorial jurisdiction would not be permitted if the defendant was a private party. The resulting interference is not just about a foreign government's ability to *regulate* commercial activities of private entities within its borders; it is about how the sovereign defendant *operates* and provides *legal remedies* for its commercial activities within its borders. Moreover, 28 U.S.C. § 1605(a)(2) of FSIA is more explicit in its non-applicability to claims based on overseas activities than any of the statutes at issue in *Aramco*, *Empagran*, or *Morrison*.

F. Just like FSIA § 1605(a)(2), International Treaties on State Immunity Take Geographical Limitations of Jurisdiction Into Account

The U.N. Immunities Convention states the general rule of modern international law that "[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the Courts of another State subject to the provisions of the Present Convention" or some other convention or consent. *Id.* 44 I.L.M. 803, art. 5. Thus, it remains clearly recognized that exceptions to strict sovereign immunity are those that are defined and limited. Importantly, under both the U.N. Immunities Convention and the European Immunities Convention (1495 U.N.T.S. 182), the "commercial" wrong being challenged must take place in or be closely related to the forum state that seeks to exercise jurisdiction.

Thus, the European Immunities Convention only allows claims against a state for personal injury when "the injury or damage occurred in the territory of the

State of the forum, and if the author of the injury or damage was present in that territory at the time." 1495 U.N.T.S. 182, art. 11.

Secondly, the European Immunities Convention allows the exercise of jurisdiction where a state "engages in the same manner as a private person, in an industrial, commercial or financial activity and the proceedings relate to that activity of the office, agency or establishment" that the defendant state has "on the territory of the State of the forum." *Id.*, art. 7.

The provisions in the U.N. Immunities Convention broadly parallel the earlier European Immunities Convention. Jurisdiction over a state in a claim for personal injuries is only permitted "if the act or omission occurred in whole or in part in the territory of that [forum] State and the author of the act or omission was present in that territory at the time. " U.N. Immunities Convention, art. 12. And a forum state can assert jurisdiction over a state's commercial transactions when "by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of [the forum] State." *Id.*, art. 10.

The FSIA likewise limits jurisdiction over foreign states to cases concerning claims based upon commercial activities in the United States. Members of this Court have previously used the European Immunities Convention to help interpret the FSIA. *See, e.g.*, *Republic of Aus. v. Altmann*, 541 U.S. 677, 708 (2004) (concurring opinion of Justices Breyer and Souter using the European Immunities Convention to help interpret the FSIA).

Questions concerning sovereign immunity are threshold issues in civil litigation. The International Court of Justice found in a 2012 case that "a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established."[14]

In this case, the geographic limitations on the exercise of jurisdiction, common to most European legal systems as a freestanding concept, also apply to cases against sovereign-owned entities. This is a major reason why the Governments believe that the international law concepts of jurisdiction and sovereign immunity should be analyzed separately, even if they coincide in the present case.[15]

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[14] *See Jurisdictional Immunities of The State (Germany v. Italy: Greece Intervening)*, 2012 I.C.J. 143, ¶ 82 (Feb. 3) *available at* http://www.icj-cij.org/docket/files/143/16883.pdf.

[15] As noted by the ICJ, "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction." *Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. of Congo v. Belg.)* 2002 I.C.J. 3, ¶ 59 (*"Arrest Warrant Case"*), *available at* http://www.icj-cij.org/docket/files/121/8126.pdf.

III. UNDER INTERNATIONAL LAW PRINCIPLES ON THE EXERCISE OF JURISDICTION, A FOREIGN GOVERNMENT ENTITY SUCH AS OBB CANNOT BE MADE SUBJECT TO U.S. CIVIL JURISDICTION FOR INJURIES SUFFERED ABROAD

A. International Law Requires a Sufficiently Close Connection to the United States in Order for An American Court to Exercise Civil Jurisdiction

It is now widely accepted that states must rely on an internationally recognized principle of jurisdiction before exercising extraterritorial jurisdiction. The International Court of Justice has required states to prove a relevant basis of jurisdiction.[16] And it is axiomatic that the exercise of *civil* jurisdiction by a state depends on "there being *between the subject matter and the state exercising jurisdiction a sufficiently close connection* to justify that State in regulating the matter and perhaps also to override any competing rights of other States."[17] International law imposes this requirement in order to minimize such conflicts between states and to prevent forum shopping by plaintiffs and defendants rushing to obtain judgments in a forum that favors their own interests.

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[16] *See The Nottebohm Case* (*Liech. v. Guat.*), 1955 I.C.J. 4 (Apr. 6). *See also Anglo Norwegian Fisheries Case* (*U.K. v. Nor.*), 1951 I.C.J. 116 (Dec. 18), and Malcolm N. Shaw, *International Law* 469 (7th ed. 2014).

[17] Sir Robert Jennings & Sir Arthur Watts, eds., *Oppenheim's International Law*, at 457-8 (9th ed. 1992) (emphasis added); *See also* Bernard H. Oxman, *'Jurisdiction of States', in Encyclopedia of Public International Law* (Rudolf Bernhardt, ed., 1997).

Furthermore, the Court's due process jurisprudence governing when foreign corporations can be sued in a U.S. state has generally been consistent with international law principles of jurisdiction. *See, e.g. Daimler AG v. Bauman*, 134 S.Ct. 746, 751 (2014) ("*Daimler*"); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2012) ("*Goodyear*"). This jurisprudence generally coincides with the "sufficiently close connection" requirement of international law as recognized by the International Court of Justice and other traditional sources; and is useful in deciding the international law questions starkly presented by the Ninth Circuit's decision in the present case.

B. Plaintiff's Tort Claims Do Not Fall within Any Category of Civil Jurisdiction Recognized by International Law as Reflected in the Third Restatement of Foreign Relations Law of the United States

Appellee's tort claims are all based on a serious injury suffered while she was trying to board a passenger train operated by the Austrian state railway in Austria. The sole connection to the United States, accepted by the Ninth Circuit, is an Internet sale by an independent third party: "Under traditional theories of agency, RPE's act of selling the Eurail pass to Ms. Sachs within the United States can be imputed to OBB as the principal." Pet. App. at 18. That connection is simply nowhere near enough to establish U.S. jurisdiction.

First, the alleged acts of negligence by OBB that caused the Plaintiff injury did not occur within U.S. territory—territoriality being "by far the most common basis for the exercise of jurisdiction to prescribe,

and generally free of controversy." Restatement (Third) Foreign Rel. Law § 402 (1987).

Second, since OBB is a foreign entity, the facts of the case do not call into play the "active personality principle" of international law, which allows a forum state to exercise jurisdiction over its nationals. *Id.* § 402(1)(e).

Third, the challenged conduct did not have a "substantial effect" within the territory of the United States—and thus does not call into play the so-called "effects principle" that is provided for in the FSIA. *Id.* § 402(1)(c). Even in U.S. practice, it only applies to "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[18]

Fourth, the "passive personality" principle, where jurisdiction is based on the nationality of the plaintiff only, "has not been generally accepted for ordinary torts. " *Id.* § 402, cmt. g. Thus, the Appellee should not be able to invoke this principle either. Additionally, the Ninth Circuit's reasoning does not even depend on the citizenship of the Plaintiff: a U.S. resident, regardless of nationality, who had purchased a Eurail pass online while still in the United States could then sue any European railway in the United States for a personal injury suffered in Europe.

Even though the United States could not exercise jurisdiction over this case without violating international law, Ms. Sachs was not without access to a proper legal remedy. She could have pursued her claim against OBB in an Austrian court, which the

[18] *Hartford Fire Insurance Co. v. Cal.*, 509 U.S. 764, 796 (1993).

Governments believe would have provided her a fair and adequate forum for her claims.

C. The Court's Jurisprudence Involving Specific U.S. Jurisdiction Over Foreign Defendants for Injuries Occurring Abroad Tends to Coincide with the *Sufficiently* Close Connection Requirement of International Law

In the case of government owned entities, the U.S. Restatement of Foreign Relations explains:

> Although a foreign state has been held not to be a "person" within the meaning of the due process clause [of the Fifth and Fourteenth Amendments], it was apparently the intention of the Foreign Sovereign Immunities Act that foreign states be treated like private entities for the purpose of determining the necessary connection with the forum.[19]

Even if this Court accepted the Ninth Circuit's conclusions about OBB's alleged "commercial activities carried on in the United States" (i.e., contracting with the Plaintiff via an indirect agent), these facts would not come close to satisfying the sufficiently close connection to the forum that this Court has required in recent cases in rejecting specific jurisdiction in the United States for tort claims of plaintiffs injured abroad. *See Daimler AG v. Bauman*, 134 S.Ct. 746 (2014) (reversing another expansive Ninth Circuit "agency" decision); *Goodyear*, 131 S.Ct. 2846 (2012);

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[19] Restatement (Third) Foreign Rel. Law, § 453, Reporters' Note 3.

and *Helicopteros Nationales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1987) ("*Helicopteros*").

D. In the Internet Age, Respect for Sovereignty Still Remains Very Important to the International Legal System

In the modern Internet world, the widespread business and consumer use of a powerful search engine means that ever more impersonal and international transactions are likely to occur—thus potentially raising jurisdictional and substantive legal questions under international law and the laws of more than one sovereign state. This basic reality makes adherence to international law regarding national jurisdiction more important than ever.

Customary international law is founded on a broad international consensus, which is based on "evidence of a general practice accepted as law."[20] In an often-quoted passage, the International Court of Justice has stated that for a rule of customary international law to be created:

> An indispensable requirement would be that State practice, including that of the States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; –and should moreover have occurred in such way as to show a general recognition

[20] Statute of the International Court of Justice, Art. 38, June 26, 1945, 59 Stat. 1055, 1060 (1945).

> that a rule of law or legal obligation is involved.[21]

The same theme is sounded in the U.S. Restatement of Foreign Relations Law: "[C]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."[22]

International law clearly requires that national courts respect the international legal rules on jurisdiction—which is precisely what the Ninth Circuit has avoided doing in this case. As already emphasized (in Argument III.B above), the bases for the exercise of civil jurisdiction under international law are generally well-defined, based mostly on territoriality where the alleged wrong occurred or the nationality of the alleged wrongdoer. Customary international law has never accepted extraterritorial civil jurisdiction for a tort claim against a foreign national for foreign conduct abroad that had no sufficiently close connection with the forum state.

It would be illogical for the FSIA, whose main purpose is to limit jurisdiction over foreign sovereign entities, to be interpreted to allow broader jurisdiction than is permitted under international law. In effect, such a result would mean that state-owned entities are more likely to end up in American courts than private entities.

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[21] *North Sea Continental Shelf (F.R.G. v Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 3, 43 (Feb. 20).

[22] Restatement (Third) Foreign Rel. Law, § 102, cmt. 1 (1987).

Under international law, the proper forum for adjudication of Ms. Sachs' claims is Austria regardless of whether she had bought her ticket to travel online from a website in Massachusetts, California, the Netherlands or Austria—or even in person from a travel agent in California. The existence of the Internet should not be allowed to blur that reality or become an excuse to ignore the international law rules requiring clear connection to the forum.

If the Internet were allowed to justify a huge expansion of extraterritorial jurisdiction against foreign parties for their operations abroad (as the Ninth Circuit has done in this case), then some unfortunate consequences would be likely to follow.

As the International Rail Transport Committee warned in their brief at the Petition stage, "faced with the potential for having to defend personal injury actions in American courts, foreign railways will alter their business and ticketing practices in ways that will undoubtedly inconvenience American travelers."[23]

And the European Commission has also reacted reciprocally to protect its member states, corporations and individuals against the effect of extraterritorial legislation adopted by the United States.[24]

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[23] *Amicus Curiae Brief of the International Rail Transport Committee ("CIT") in Support of ÖBB's Petition for Writ of Certiorari*, April 7, 2014, *ÖBB v. Sachs*, No. 13-1067, at 16.

[24] *See* European Commission, Council Reg. No. 2271/96 of 22 November 1996, 1996 O.J. (L 309) 1 (protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996R2271:EN:HTML

E. This Case Illustrates The Kind Of Forum Shopping That Is Inconsistent With International Comity And The Practices Of Other Nations

It is a well-known fact that litigation rules vary considerably across national legal systems. Firstly, there is the so-called "American rule" on litigation costs, which requires each side to bear its own costs—rather than requiring the losing plaintiff to reimburse some or all of the successful defendant's litigation costs (and vice-versa).[25] Secondly, the U.S. legal system also makes relatively broad discovery available to plaintiffs that tend to drive up the non-reimbursable litigation costs that an ultimately successful defendant will still have to bear.[26] Thirdly, the right to a jury trial in a civil case, guaranteed by the Seventh Amendment to the U.S. Constitution, is generally not available elsewhere, and tends to generate higher settlements.[27] Fourthly, punitive damages

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[25] *See, e.g., Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 255 (1975).

[26] *See, e.g., Bell Atlantic v. Twombley*, 550 U.S. 544, 548 (2007) (where this Court cited the burdens of discovery as one of the reasons to impose enhanced standards of what a plaintiff had to be able to plead in order to survive a motion to dismiss under Fed. R. Civ. P.12(b)(6).)

[27] *See, e.g.*, William Glaberson, *NAFTA Invoked to Challenge Court Award, N.Y. Times*, Jan. 28, 1999, *available at* http://www.nytimes.com/1999/01/28/business/nafta-invoked-to-challenge-court-award.html?pagewanted=all&src=pm (two leading U.S. international trade experts "noted that business leaders in other countries have for years complained that America's large jury verdicts make investment here unpredictable").

are available in the United States, but generally not allowed elsewhere.[28]

In the Governments' view, plaintiffs should not be allowed to exploit these differences between national legal systems and choose the litigation rules that best suit their interests in a particular case. Forum shopping has the potential to seriously undermine the ability of States to regulate litigation between private parties within their national jurisdictions. It may lead to an international "race-to-the bottom" in which the forum offering the most convenient rules to plaintiffs for particular disputes prevails. In this sense, to allow forum shopping is a sword that cuts both ways. Not only would it permit a plaintiff to obtain the benefits of U.S. litigation rules for a tort committed entirely on foreign territory; it would also make it possible for plaintiffs to obtain remedies for wrongs allegedly committed within U.S. territory before any foreign court. Plaintiffs could freely choose their forum worldwide, taking into account legal but also practical and perhaps even opportunistic considerations. It is difficult to see how states could under such circumstances effectively exercise their sovereign right to regulate within their sovereign boundaries.

The well-established international rules on jurisdiction are so important because they regulate between states, on a sovereign and equal basis, under which circumstances the right of one state to exercise its jurisdiction prevails. They are not overly rigid and allow for exceptions from the principle of territorial jurisdiction in justified cases, for example in accordance with the active personality principle or the effects

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[28] John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 Colum. J. Transnat'l L. 391, 396 n.24 (2004).

principle discussed above. Ordinary tort claims do not justify such exceptions. On the contrary, the present case illustrates that it is in the interest of every sovereign state to uphold the existing international rules on jurisdiction because they are necessary to protect their spheres of regulatory competence. In the present case, the injury was sustained in Austria and there was a remedy available in Austrian courts.[29]

Here, the plaintiff seeks to obtain the benefit of litigation rules available in the United States that have not been accepted by other states.[30] Thus this case is simply the latest in the recent series of cases where this Court has had to review decisions dealing with jurisdiction over foreign acts or defendants—including the decisions in *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011) ("*McIntyre*"), *Goodyear* in 2013 and *Daimler* in 2014.

Any jurisdictional rule adopted here could also necessarily be applied to a U.S. class action, and the U.S. style class actions has become a growing source of concern to the Governments and foreign enterprises. The unique U.S. combination of (i) the "opt out" class action system provided for in the United States under Fed. R. Civ. P. 23 and its state law counterparts and (ii) the "American rule" on litigation costs, have been

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[29] As the court discussed in *Sosa*, it would consider international law's requirement of exhaustion of local remedies in an appropriate case. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

[30] *See, e.g.*, the European Commission's discussion of efforts to achieve more balanced private litigation rules in its *White Paper on Damage Actions for Breach of EC Competition Rules*, COM (2008) 165 (April 2, 2008), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52008DC0165&from=EN.

rejected by other countries establishing collective remedies for consumers. This has led to the filing in the United States of large class action claims against foreign defendants that this Court has had to reject on jurisdictional grounds in *Empagran*, *Morrison*, and *Kiobel*.

Concerns about U.S. style class actions were clearly reflected in a 2013 recommendation by the European Commission that the E.U. Member States adopt some form of collective redress for victims. As it stated:

> For the Commission, any measures for judicial redress. *must not attract abusive litigation or have effects detrimental to respondents* regardless of the results of the proceedings. Examples of such adverse effects can be seen in particular in 'class actions' as known in the United States.[31]

As a result of these various U.S. rules and practices, this Court must continue to play its traditional role of guardian of international law and comity to avoid forum shopping.

IV. THE GLOBAL NATURE OF INTERNET PARTICIPATION MAKES THE WELL-ACCEPTED LIMITATIONS ON NATIONAL JURISDICTION UNDER INTERNATIONAL LAW MORE IMPORTANT THAN EVER

Appellee Ms. Sachs, a California resident, was injured while travelling on a 4-day Eurail pass that she had bought a month earlier over the Internet from a

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[31] *Towards a European Horizontal Framework for Collective Redress*, at 8, COM (2013) 401 final (June 11, 2013), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0401&from=en (emphasis added).

Massachusetts-based travel agency (RPE) acting on behalf of a Netherlands-headquartered consortium of 30 European railroads (Eurail Group), which includes OBB. OBB did not have a controlling interest in Eurail Group and had had nothing to do in selecting or supervising RPE or its other agents.

The Ninth Circuit concluded that where and how the Plaintiff happened to purchase her Eurail pass was critical to its jurisdictional analysis of her claim for injury suffered in Austria.

> Where a ticket for travel on a foreign carrier is bought and paid for in the United States, we conclude that the substantial contact requirement is satisfied. The sale and marketing of Eurail passes within the United States is sufficient to meet the substantial-contact element and to show that OBB carried on commercial activity in the United States.

Pet. App. at 32. In the Governments' view, this analysis represents a significant expansion of jurisdiction even by pre-Internet standards, and becomes radical when seen in the Internet context in which consumers now operate.

But the District Judge in this case correctly found that Ms. Sachs' "unwieldy theory of subject matter jurisdiction would seem to ensnare all thirty members of the Eurail Group." Pet. App. at 109.

The "agency" claim is particularly extreme in the current case. Ms. Sachs purchased her right to travel in a one-off transaction from a specialized Internet agent which might not have even been doing enough

business in California to be subject to suit in California under constitutional due process principles. And Ms. Sachs' license to travel in Austria was not Austria-specific and was not issued or sold by the Defendant OBB.

Suppose as an alternative, Ms. Sachs had turned to a major U.S-based Internet seller of travel services such as Expedia and obtained her Innsbruck-to-Prague ticket from them. Such a firm, doing thousands of transactions a day, would clearly be subject to specific personal jurisdiction in California. But Expedia handles reservations for thousands (if not more) travel providers and hotels abroad—and it would not make sense that all such entities could be sued in the United States for injuries suffered abroad solely because reservations could be booked online in the United States. In responding to today's electronic reality, it makes sense to look back to the legal analysis that this Court would have applied in the pre-Internet world. In 1985, Ms. Sachs would have probably bought her Eurail pass or OBB ticket from a local brick-and-mortar travel agent. That this agent was present in California and subject to general personal jurisdiction there did not somehow make the foreign railway or airline suddenly subject to jurisdiction in California, either.

V. INTERNET SALES OF A FOREIGN SERVICE TO U.S. RESIDENTS SHOULD NOT TRIGGER U.S. CIVIL JURISDICTION FOR A CLAIM BASED ON AN INJURY OR LOSS SUFFERED OUTSIDE THE UNITED STATES

This case involves a domestic plaintiff suing a foreign defendant for an injury that was suffered abroad, where the only connection to the California forum is that the purchaser was in California when she bought her ticket on the Internet from a travel agent over 2,000 miles away. Given this very limited factual connection, the Ninth Circuit's decision generates serious concern among foreign enterprises and foreign governments about how U.S. litigants and courts may compel foreign entities, who sell foreign services on the Internet, to defend themselves in a faraway nation for a claim with which they have no connection. Fortunately, this case offers this Court a chance to reassure an international audience that the Internet has not turned international law and constitutional "due process" on their heads in the 21st Century.

A. This Court's Extensive Experience With Unjustified Jurisdictional Claims Under State Long Arm Statutes Should Provide It With the Tools for Resolving Extraterritorial Jurisdictional Disputes in Accordance With International Law

The international cases in which this Court has rejected U.S. plaintiffs' claims against absent defendants based on state long arm statutes cover a wide range of circumstances in which a reasonable connection with the forum was always at issue. These include claims for (a) domestic injuries from imports manufactured abroad, as in *McIntyre and Asahi Metal*

Industry Co. v. Superior Court of California, 480 U.S. 102 (1987); and (b) claims for foreign injuries caused by overseas affiliates of domestic defendants, as in *Goodyear* and *Helicopteros*. In most of these modern cases, the issue is not general jurisdiction over the defendant, but rather whether there is "specific jurisdiction 'in a suit arising out of or related to the defendant's contacts with the forum." *McIntyre* at 131 S.Ct at 2788 (quoting *Helicopteros*). As the Court further explained in *McIntyre*:

> Where a defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws, it submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State.[32]

Thus determination of "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis . [to determine] whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign." *Id.* at 2789. Moreover, where the "purposeful availment" inquiry concerns a foreign defendant, the relevant activities and contacts must be directed at the particular U.S. state where the case is brought. In *McIntyre*, "[t]hese facts may reveal an intent to serve the U.S. market, but they do not show that J.McIntyre purposefully availed itself of the New Jersey market." *Id.* at 2790.

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[32] *Id.* at 2787-8.

Also, the number and continuity of the transactions in the forum may be important in making this "purposeful availment" assessment. As Justice Breyer emphasized, concurring in *McIntyre*, "[n]one of our precedents finds that a single isolated sale, even if accompanied by the kinds of sales effort indicated here, is sufficient" to establish specific jurisdiction. *Id.* at 2792.

B. Offering Global Internet Users Information and Purchase Opportunities Does Not of Itself Constitute "Purposeful Availment" in Any Particular U.S. Forum

The Internet tends to generate communications and transactions among parties who have had no (or only limited) prior relationships and are quite distant from each other. "Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods." *Reno v. ACLU*, 521 U.S. 844, 851 (1997). "From the publishers' point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers." *Id.* at 853.

The resulting communications may be unique, random or recurring. The resulting legal disputes may concern the content of the Internet communication itself; and, if so, then the jurisdictional inquiry must be whether there is sufficient connection to the forum to meet the "purposeful availment" standard there. Two different cases involving claims about domain names illustrate the point. *See e.g., Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1156 (9th Cir. 2006) (a passive

U.K. website's "acts were not aimed at California and, regardless of foreseeable effect, are insufficient to establish jurisdiction" there); and *Zippo Mfg. Co v. Zippo Dot Com.*, 952 F.Supp. 1119, 1125 (W.D. Pa. 1997) (communications to 3,000 individuals and seven Internet access providers in Pennsylvania allowing them to download the messages on which the suit was based constituted "purposeful availment" in Pennsylvania).

Alternatively, as the present case illustrates, the website may provide the consumer with the information about possible actions she could take, and this causes her to enter into a purchase transaction which leads to her ultimate injury (but does not cause it). In other words, the service provider (i.e., OBB) or specialist intermediary (i.e., RPE) may publish information on train schedules and prices in Austria—information that can be accessed in California but is not primarily directed to this or any other particular geographic area. This passive activity cannot constitute "purposeful availment" in California, and it does not then become "purposeful availment" by OBB just because Ms. Sachs or some other Californians happened to use RPE's website to buy a ticket.

As the Seventh Circuit has found, "[i]f the defendant merely operates a website, even a 'highly interactive' website, that is accessible from, but does not target, the forum state, then the defendant may not be haled into court in that state without offending the Constitution." *be2 LLC v. Ivanov*, 642 F.3d 555, 559 (7th Cir. 2011). *See also Dagesse v. Plant Hotel N.V.*, 113 F. Supp. 2d 211, 224 (D.N.H. 2000)(finding that a foreign hotel did not have sufficiently continuous or systematic contacts with New Hampshire to exercise

jurisdiction, despite the fact that the plaintiff booked reservations through a U.S. travel agent, and the hotel allowed reservations to be booked online).

Internet transactions can occur in a variety of circumstances. The present case only involves *services* to be performed by a foreign party in its home territory. It thus differs from the case where a foreign Internet seller has made online sales of *goods* to U.S. customers, which goods are then shipped to the United States and subsequently cause injury to a U.S. customer.

Today, the common law development of jurisdiction over Internet transactions by U.S. courts is generating a great diversity in analyses and resulting legal uncertainty. Given the openness and global scope of the Internet, this Court must take the lead in providing guidance to state and federal courts on how to apply international law in resolving the recurring jurisdictional questions which the Internet is generating for them.

CONCLUSION

The Ninth Circuit decision under review did not take into account international law concerning sovereign immunity and jurisdiction, while creating worldwide U.S. civil jurisdiction against foreign common carriers that sell tickets for foreign travel via U.S. agents or Internet suppliers. This case is thus an excellent vehicle to chart a clearer course and interpret the FSIA in conformity with international law. This Court can thereby provide important guidance on how well-established limitations on extraterritorial civil jurisdiction could be applied to Internet transactions involving foreign parties.

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AMICUS CURIAE BRIEF

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In The Supreme Court of the United States

ÖBB PERSONENVERKEHR AG,
Petitioner,

v.

CAROL P. SACHS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE INTERNATIONAL RAIL TRANSPORT COMMITTEE ("CIT") IN SUPPORT OF ÖBB PERSONENVERKEHR AND REVERSAL

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BRIEF OF AMICUS CURIAE

International Rail Transport Committee (known as "CIT" for *Comité International des Transports Ferroviaires*) submits this brief in support of ÖBB Personenverkehr AG.[1]

INTEREST OF AMICUS CURIAE

Founded in 1902, CIT is a nonprofit association of over 200 railway undertakings and shipping companies, primarily in Europe, that provide international passenger and freight services. Specifically, CIT consists of about 120 direct members and approximately 80 organizations linked indirectly as associate members. Headquartered in Bern, Switzerland, CIT is an association under Swiss law. (See www.CIT-rail.org.)

CIT represents the interests of rail carriers vis-à-vis legislators, regulatory authorities, and other tribunals. CIT helps railways implement international rail transport law. CIT drafts and maintains legal publications and template documents for international rail traffic; standardizes contractual relationships between

[1] CIT's counsel authored this brief in whole, and no other person or entity other than CIT, its members, or counsel made monetary contributions for the preparation or submission of this brief. CIT's counsel notified counsel for the parties of its intent to file this amicus brief and received their consent.

customers, carriers and infrastructure managers; and provides regular briefings, training courses and legal advice to its members.

CIT is funded by its members' annual dues, paid in proportion to the volume of international passenger or freight traffic they transport. The minimum annual subscription is approximately €1700. Each full member has one vote, regardless of the amount of its dues.

ÖBB-Holding AG, the parent entity over subsidiaries ÖBB-Personenverkehr AG (Österreichische Bundesbahnen, i.e., Austrian Federal Railways for passengers) and Rail Cargo Austria AG, is a CIT member, and pays membership fees of about €202,000. ÖBB-Holding made no special payment for this amicus brief.

Approximately 90 percent of CIT's railway members are, like ÖBB, government entities. Tens of thousands of Americans purchase Eurail Passes annually, and many more American passengers use other CIT member railways. Thus CIT's members may find themselves in the same situation as ÖBB—that is, having their foreign sovereign immunity defeated by the "commercial activities" exception (28 U. S. C. §1605(a)(2)) simply because an American passenger purchased a ticket through a travel agency in the United States. As a result, European railways could be

forced to defend tort actions in the United States arising from accidents occurring entirely in Europe.

The Ninth Circuit's opinion affects not only petitioner ÖBB, but many railways around the world, and especially CIT's membership. The opinion exposes CIT's members to litigation in American courts in new and unexpected ways, contrary to existing understanding of American and international law.

If sovereign immunity is so easily bypassed as in this case, foreign governments and international treaty organizations may respond in kind, diminishing their own immunity rules. Many Europeans use American railways, yet those railways presumably do not expect to be haled into European courts to resolve personal tort claims for accidents in the United States. At the very least, without this Court's corrective action, European railways will be forced to change their business practices to avoid exposure to American lawsuits. Such changes are likely to make it more inconvenient for Americans to purchase international railway passage.

In short, as the interface between the law and business practices of the European railway industry, CIT has a vital interest in the issues raised by this case. CIT is able to present an industrywide and broader international law perspective that may be helpful to the Court.

SUMMARY OF ARGUMENT

The Ninth Circuit's opinion expanded the reach of American courts beyond existing precedent and the governing law of agency. See, *e.g.*, *Daimler AG* v. *Bauman*, 571 U. S. __, 134 S. Ct. 746 (2014). Reversal is necessary to rectify that erroneous decision that stretches beyond the bounds of both American and international law.

An International Perspective: Plaintiff Carol Sachs' voyage falls under international conventions that regulate it in mandatory ways, including setting the rules on the railway's liability and establishing procedural aspects of claims and legal actions. Ms. Sachs should have filed suit in Austria, and doing so would have well protected her rights. She could have obtained many forms of redress and damages, possibly even remedies beyond what American law provides. The Ninth Circuit's approach is out of step with the governing conventions of international rail law.

Furthermore, with regard to American law, immunity is supposed to protect foreign states unless that state engages in commercial activity in the United States and the lawsuit is "based upon" that commercial activity. Neither element is satisfied in this case.

Error Regarding Agency: The Ninth Circuit found that ÖBB engaged in commercial activity in the United States based on the acts

of an agent's subagent. But the connection between ÖBB and the American travel agency—which actually involved subagencies across three continents over which ÖBB had no control—is far too attenuated to support the conclusion of commercial activity in the U.S. by ÖBB. The necessary control by a principal is entirely lacking in this scenario involving ticket vendors through multiple subagents.

The Ninth Circuit used common-law agency principles to broadly interpret this exception to immunity. But applying common law creates possible different outcomes for various American jurisdictions. Instead, the court should have interpreted the exception narrowly and should have done so using federal precedent. As Judge O'Scannlain noted in his dissent: "Courts should guard against overly broad readings because expanding federal jurisdiction in this area can have serious foreign policy consequences." (App. to Pet. for Cert. 43.)

Finally, Ms. Sachs' injuries do not really derive from the asserted "commercial activity" of purchasing a ticket on the Internet. To say that her claims involving a platform accident in an Austrian railway station are "based on" the commercial activity of purchasing her Eurail Pass stretches the concept of connecting the accident to American commerce beyond recognition.

REASONS FOR REVERSING THE NINTH CIRCUIT

ÖBB cogently explains why it did not engage in commercial activity in the United States through any agent. It explains how the Ninth Circuit misapplied the Foreign Sovereign Immunity Act's definition of "agency" of a "foreign state," contradicting this Court's governing law, such as *First National City Bank* v. *Banco para el Comercio Exterior de Cuba*, 462 U. S. 611 (1983). ÖBB further outlines how Ms. Sachs' claims were not "based upon" any commercial activity in the United States, but rather on alleged torts occurring in Austria. This, too, contradicts this Court's governing law. See, *e.g.*, *Saudi Arabia* v. *Nelson*, 507 U. S. 349 (1993).

ÖBB also describes how the Ninth Circuit dramatically expanded American jurisdiction over foreign sovereigns by erroneously interpreting immunity narrowly and the commercial-activities exception broadly—precisely the opposite of how existing law requires courts to interpret those concepts.

CIT endorses and echoes those arguments. From CIT's vantage, however, this litigation presents issues not merely in an "American case" but rather needs to consider European viewpoints and applicable law as well.

I.
THE EUROPEAN PERSPECTIVE: MS. SACHS HAD AMPLE REMEDIES IN EUROPE AND THUS NO NEED TO RESORT TO AMERICAN JURISDICTION

Underlying the Ninth Circuit's opinion may have been the unexpressed fear that without a means to overcome sovereign immunity, Americans like Ms. Sachs would lack redress for injuries suffered on European railways. That notion is unfounded.

Ms. Sachs' intended journey from Austria to the Czech Republic is subject to the Convention Concerning International Carriage by Rail (COTIF), which governs rail travel in nearly 50 nations in Europe, Caucasia, the Maghreb, and the Middle East. Both Austria and the Czech Republic ratified the Convention and it is thus mandatory for all international rail journeys between the two countries.[2]

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[2] That the contract of carriage between Ms. Sachs and ÖBB is governed by the COTIF/CIV is further confirmed by the notation "CIV" on the rail pass itself (as required by CIV article 7) and is explicitly mentioned in the general terms and conditions applicable to the pass. (JA at 35, 39, 82.) Thus, when Ms. Sachs entered into the contract of carriage, she accepted the terms and conditions, including the applicable law and jurisdiction, governed by COTIF/CIV.

The Convention's Appendix A sets forth the Uniform Rules concerning the Contract for International Carriage of Passengers by Rail (CIV, for *Convention Internationale pour le transport des Voyageurs*), which contains detailed provisions governing carrier liability for passengers who suffer delays or accidents. The CIV also details procedural rules determining the jurisdiction and applicable national law in civil litigation.

The CIV's liability system is a modern system of law that strikes a fair balance between the interests of passengers and carriers. It is well accepted in the railway business, similar to how the Montreal Convention governs international air travel and the Athens Convention covers international sea travel. Since December 2009 it has also become applicable as domestic law in the member states of the European Union. See Regulation (EC) No. 1371/2007 (on rail passengers' rights and obligations), art. 11 (liability for passengers, citing the CIV).

The CIV's article 5 provides that "any stipulation which, directly or indirectly, would derogate from the CIV shall be null and void." In Ms. Sachs' case, her Eurail Pass was subject to the mandatory provisions of the CIV.

The CIV makes clear that a rail passenger injured in an accident may hold liable the carrier that was contractually bound to provide

passenger service. (CIV art. 26, §5.) The CIV provides that the "carrier shall be liable for the loss or damage resulting from the death of, personal injuries to, or any other physical or mental harm to, a passenger, caused by an accident arising out of the operation of the railway and happening while the passenger is in, entering or alighting from railway vehicles whatever the railway infrastructure used." (CIV art. 26, §1.) A carrier may raise the "fault of the passenger" as a defense. (CIV art. 26, §2.) In this case, ÖBB was the carrier, and thus would be 100 percent liable unless it could reduce its liability by proving some percentage of fault by Ms. Sachs.

The CIV also outlines types of recoverable damages for personal injuries. (CIV art. 28.) For Ms. Sachs, these could include necessary costs for medical treatment and transport, compensation for financial loss caused by a total or partial inability to work (e.g., loss of earnings and future earnings), and expenses incurred to cover her increased needs in light of her injuries.

Additionally, the CIV expressly allows supplemental damages for bodily injury as provided under the national law of the jurisdiction where the action is brought. (CIV art. 29.) These could include, for example, *pretium doloris* (pain and suffering damages)

and compensation for impairment to the enjoyment of life.

Articles 56 and 57 outline which court has jurisdiction (i.e., the domicile of the defendant) and explicitly exclude courts outside the member states of the Intergovernmental Organization for International Carriage by Rail (OTIF). In this case, only Austrian courts would have jurisdiction.

OTIF, the international organization responsible for establishing and developing the COTIF, has published commentary to the Convention and its Appendixes for use as an aid in interpreting the Convention. See Vienna Convention on the Law of Treaties art. 32 (supplementary means of interpretation). That commentary explains, under CIV article 57, why the OTIF member states decided to exclude the jurisdiction of other states' courts, referring explicitly to the situation of American citizens traveling in Europe.

International passengers contracting with railways within the COTIF's scope are bound by the Convention. The same, of course, is true for the railways—they cannot choose the applicable law, but are bound by the Convention as well. This equality serves the interests of both passengers and carriers.

Ms. Sachs could and should have filed suit in Austria, where the accident occurred and

where the courts would have been competent to fairly hear and resolve her case, and award damages under the Convention, the CIV. and Austrian law. (See JA at 71.)

CIT emphasizes that any *European* passenger coming from a country other than Austria would have been in the same position as Ms. Sachs. For example, a Portuguese passenger would have had to sue ÖBB in Austria, not at home in Portugal. This rule is widely accepted internationally and should hold true for passengers contracting with European carriers for European voyages, regardless of where they are from or where they were located when they formed a contract by purchasing a ticket (even, as in this case, when using the Internet). This accords with the general principle of international law that contractual disputes between private parties should be venued in the defendant's domicile. That has been the law for hundreds of years. The Ninth Circuit's analysis is well outside international standards and should be rejected.

II.
THE NINTH CIRCUIT ERRED IN FINDING AGENCY THROUGH MULTIPLE SUBAGENTS NOT UNDER ÖBB'S CONTROL

CIT disputes that ÖBB engaged in commercial activity in the United States. The district court and original Ninth Circuit panel correctly recognized that the connection between ÖBB and the American travel company The Rail Pass Experts (RPE), from which Ms. Sachs purchased a Eurail Pass over the Internet, was too attenuated. In fact, the connection in this case, and in most similar situations, is even weaker than it appears.

The Ninth Circuit's en banc opinion notes that while at home in California, Ms. Sachs purchased her Eurail Pass over the Internet from RPE, located in Massachusetts. What the opinion does not note is that RPE was a subagent of Flight Centre Travel Group Limited, based in Brisbane, Australia, which bills itself as the "world's largest travel agency." (See www.FlightCentre.com.) Flight Centre acted as the general sales agent for the Eurail Group G.I.E. (www.EurailGroup.org), an association of 30 European railways (29 of which are CIT members) responsible for the marketing and management of Eurail products,

notably Eurail Passes such as the one Ms. Sachs purchased.[3]

Thus there is actually a chain of three purported "subagents"—based in three different countries on three different continents—separating Ms. Sachs and ÖBB: RPE in America, Flight Centre in Australia, and Eurail in Europe. Although this point may be dehors the limited appellate record in this particular case, it remains generally relevant to CIT's members because this arrangement is not only common, but is an industry norm.

As Judge O'Scannlain's dissenting opinion notes, a significant level of control—amounting to an alter ego relationship—is necessary before a principal may be saddled with the acts of an alleged agent in this context. (App. to Pet. for Cert. 51–56.) Here, however, no single railway member controls Eurail; nor does any railway exert control over the general travel agency companies that Eurail works with to market and sell Eurail Passes, let alone over the various subagents. In light of the reality of this arrangement, it simply makes no sense to

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[3] In contrast to individual point-to-point tickets, Eurail Passes, which started in 1959, are special tickets that allow non-Europeans unlimited passage for a set period of time on normally scheduled trains operated by the participating railways. (See JA at 77.)

conclude that ÖBB, several steps removed, was conducting commercial activity in the United States.

This is not to say that international law negates agency liability entirely or in general. To the contrary, CIV article 51 imputes liability to a carrier for "servants and other persons whose services [are used] for the *performance of the carriage* ."; and similarly article 39 imposes liability where a "carrier has entrusted the *performance of the carriage* to a substitute carrier " (emphasis added). But note that such imputed liability must relate to the actual "performance of the carriage," not matters beyond the immediate control of the railway, such as retail ticketing services.

If the Ninth Circuit is affirmed, CIT will be forced to advise its members that they may be drawn into American courts by virtue of ticket sales by third-party subagents. That is likely to fundamentally alter the way Eurail Passes are marketed and sold, to the detriment of American travelers.

III.
A RAILWAY'S "COMMERCIAL ACTIVITY" IS TRANSPORTATION SERVICES, NOT TICKET SALES; THE ACCIDENT HERE BEARS NO CONNECTION TO THE TICKETING PROCESS

The "commercial activity" exception to foreign sovereign immunity requires that the foreign sovereign engage in commercial activity in the U.S. Here, ÖBB did not engage in any such commercial activity. The Ninth Circuit concluded that the sale of tickets via agents via the Internet was sufficient commercial activity. This Court should reject that position.

The "commercial activity" of European railways is providing passenger and freight carriage in Europe. In so doing, they are subject to numerous regulations at the international level, European Union level, and national level. The sale of tickets on the Internet (by entities other than the railway) cannot be sufficient for these companies to become subject to foreign jurisdictions around the world. Their core activities linked to passenger service are provided exclusively in Europe, and are regulated by specific laws and conventions that should not be bypassed by lawsuits in courts outside Europe.

The sale of a ticket is merely the formation of a carriage contract between passenger and carrier. The actual service to be provided is the

carriage itself. The ticket sale has little role in the performance of the contract, let alone any alleged negligence in performance. The sale can happen anywhere on the Internet, while the carriage can only be provided in a specific area by a specific carrier in Europe. Venue for disputes regarding a carrier's performance of its transportation duties should be determined by where that true primary service was rendered and not by the "place" where the contract was formed.

Furthermore, as Judge Kozinski analyzed the situation, because Ms. Sachs' case "arises from events that transpired entirely in Austria," it is not "based upon" the commercial activity of ticket sales in the United States. (App. to Pet. for Cert. 62 ["This would be true even if Austria were itself selling train tickets from a kiosk in Times Square."].)

CONCLUSION

This case is of great concern to foreign sovereigns, even those outside the transportation realm. The Ninth Circuit's ruling ignores this Court's precedent and conflicts with other courts and international law. That radical deviation from existing law will have harmful consequences. If allowed to stand, American courts will have to resolve disputes that have essentially no connection to the United States.

Moreover, faced with the potential for having to defend personal injury actions in American courts, foreign railways will alter their business and ticketing practices in ways that will undoubtedly inconvenience American travelers. This Court should reverse the Ninth Circuit's opinion.

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AMICUS CURIAE BRIEF

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On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NML CAPITAL, LTD. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

NML Capital, Ltd. ("NML") is a fund that invests in sovereign debt through the secondary debt market in the United States.[1] NML and its affiliates have litigated before numerous U.S. federal and state courts (as well as foreign courts) in their efforts to enforce creditors' rights under debt instruments issued by sovereign debtors, including the Republic of Peru, the Republic of Congo, and the Republic of Argentina, among others. They have been involved in many of the leading decisions on the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1332(a), 1391(f) & 1601-1611. Those decisions include *Republic of Argentina* v. *NML Capital, Ltd.*, in which this Court held—in favor of NML—that the FSIA does not "limi[t] discovery in aid of execution of a foreign-sovereign judgment debtor's assets." 134 S. Ct. 2250, 2256 (2014). NML thus has extensive practical experience with the problems facing parties to commercial transactions with foreign states, like Ms. Sachs in this case. *See Republic of Argentina* v. *Weltover*, 504 U.S. 607, 617 (1992) ("Argentina's issuance of [bonds] was a 'commercial activity' under the FSIA.").

NML's most recent and extensive litigation involves bonds issued by the Republic of Argentina. In

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[1] All parties have consented to the filing of this brief. The written consents have been lodged with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, NML states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NML and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

2001, Argentina committed the then-largest sovereign debt default in history. Pursuant to the terms of the defaulted bonds, Argentina had expressly consented to jurisdiction in New York and had explicitly waived any claim of sovereign immunity with respect to lawsuits involving the bonds. Shortly after the default, bondholders (including NML) began to file actions against Argentina in the United States District Court for the Southern District of New York, and that court has entered judgments against Argentina totaling billions of dollars.

Argentina does not dispute that the judgments were validly entered. Yet it has never paid any judgment rendered in favor of NML, and it has never admitted that any of its assets are subject to execution to satisfy those judgments. To the contrary, the Argentine legislature enacted a law in early 2005 that essentially prohibits Argentina from satisfying the U.S. judgments. The ensuing litigation, in which at least 150 actions were filed, has resulted in the entry of at least 100 judgments in the Southern District of New York, at least 38 decisions by the United States Court of Appeals for the Second Circuit, at least 10 petitions for writs of certiorari to this Court, and related proceedings in other courts throughout the United States and around the world. NML has been a party to at least 68 of the actions and at least 21 of the appeals, and has filed or opposed at least 9 of the petitions for writs of certiorari.

In its efforts to enforce its rights as a bond creditor and a judgment creditor, NML has litigated, and continues to litigate, many of the issues presented by this case, including the permissible grounds for imputing conduct between a foreign state and its agents, agencies, instrumentalities, and political

subdivisions; the implications of this Court's decision in *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"); and the proper interpretation of the FSIA's exceptions to foreign sovereign immunity in actions "based upon a commercial activity carried on in the United States by [a] foreign state." 28 U.S.C. §§ 1605(a)(2) (jurisdiction), 1610(a)(2) (attachment or execution).[2] These issues are of exceptional importance to sovereign debt enforcement litigation and to the broader market for sovereign debt issuances. The Ninth Circuit correctly resolved the questions now presented before this Court, and its holding should accordingly be affirmed.

SUMMARY OF THE ARGUMENT

I. Under the FSIA, when a foreign state undertakes commercial activities in the United States, it can be sued in U.S. court and held liable under the same substantive standards applicable to any other person or entity. The FSIA's plain text and history confirm this rule, and it has repeatedly been recognized and applied by this Court.

II. That well-settled rule, in turn, resolves both questions presented in this case.

A. Foreign states that conduct business through private agents are responsible for those agents' con-

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[2] The question presented in this case concerns a foreign state's jurisdictional immunity from suit under Section 1605(a)(2); the same statutory language, however, also appears in Section 1610(a)(2)'s non-jurisdictional exceptions to immunity from attachment and execution. For ease of reference, this brief will refer to Section 1605(a)(2) and the threshold jurisdictional issue.

duct under the same common-law agency principles that govern private individuals and entities. When the agent acts on the principal's behalf, the principal acts too; and thus, when a foreign state's agent carries on commercial activity in the United States on behalf of a foreign state, the foreign state also carries on that activity. Indeed, because a foreign state can act—and conduct business in the United States—only through its agents, a state's commercial activity in the United States necessarily includes its agents' commercial activity on its behalf. The question whether a foreign state "carried on" "commercial activity" sufficient to establish jurisdiction under the FSIA's commercial-activity exception, 28 U.S.C. § 1605(a)(2), is thus governed by the same common-law principles that determine when a non-sovereign party is bound by the acts of its agent.

B. Ordinary principles of personal jurisdiction applicable to private parties also dictate the test for determining whether an action is "based upon" a foreign state's commercial activity within the meaning of the commercial-activity exception. Through the "based upon" standard, the FSIA does the work of a long-arm statute, ensuring that, when a foreign state engages in commercial activity—and thus sheds its sovereign immunity—it can be sued in the United States when there is a sufficient nexus between the United States and the plaintiff's claims. The standard is modeled on, and should be interpreted consistently with, the rule that courts have specific personal jurisdiction over a defendant in an action "arising out of" that defendant's acts in the relevant forum. Under each of the three dominant formulations of the "arising out of" standard, a court may exercise personal jurisdiction to hear a claim against a private defendant if that defendant's acts in the forum

are necessary to prove an element of the plaintiff's claim. The commercial-activity exception extends this same standard to foreign states, as the exception's text and this Court's decision in *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993), confirm. This "one-element" test is also easier to administer than the alternatives proposed by OBB and the United States.

ARGUMENT

I. UNDER THE FSIA, FOREIGN STATES ENGAGED IN COMMERCIAL ACTIVITY IN THE UNITED STATES ARE TREATED IN THE SAME MANNER AS PRIVATE PARTIES.

The FSIA treats foreign states in the same manner as private entities when those states engage in commercial activity in the United States.

A. The statute "codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden BV* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). Under that theory, foreign states are immune from jurisdiction in "suits involving the foreign sovereign's public acts," but immunity "does not extend to cases arising out of a foreign state's strictly commercial acts." *Id.* at 487.

"A foreign state engaging in 'commercial' activities 'do[es] not exercise powers peculiar to sovereigns,'" and therefore is not entitled to special treatment. *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 614 (1992) (quoting *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 704 (1976) (plurality op.)). Instead, when a foreign state "participat[es] in the marketplace in the manner of a private citizen or corporation," it is treated like such private actors. *Ibid.* The theory thus extends to foreign states the "familiar concept" that, "'[w]hen a

state enters the market place seeking customers,'" "'it divests itself . . of its sovereign character, and takes [on] that of a private citizen.'" *Alfred Dunhill*, 425 U.S. at 695-96 (plurality op.) (quoting *New York* v. *United States*, 326 U.S. 572, 579 (1946), and *Bank of United States* v. *Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907 (1824)).

B. The FSIA codifies the restrictive theory through two provisions. *First*, the FSIA's commercial-activity exception provides that a foreign state is not entitled to immunity, and can be sued in the United States, when that state engages in "commercial activity" with a sufficient nexus to the United States. 28 U.S.C. § 1605(a)(2). Jurisdiction is thus proper in any "action based upon," among other things, "a commercial activity carried on in the United States by the foreign state." *Ibid.* *Second*, the FSIA's "liability" provision states that, when a foreign state is "not entitled to immunity," the state "shall be liable *in the same manner and to the same extent as a private individual under like circumstances*." *Id.* at § 1606 (emphasis added).

Together, Sections 1605(a)(2) and 1606 ensure that, when a foreign state engages in commercial activity in the United States, it is treated in the same manner as a private entity for liability and damages purposes. As this Court has recognized, the "language" of Section 1606 "and [the] history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality." *Bancec*, 462 U.S. at 620. Instead, the FSIA "operates as a pass-through, granting federal courts jurisdiction over *otherwise ordinary actions* brought against foreign states." *Bank of N.Y.* v. *Yugoimport*, 745 F.3d 599,

609 n.8 (2d Cir. 2014) (emphasis added); *see also Oveissi* v. *Islamic Republic of Iran*, 573 F.3d 835, 841 (D.C. Cir. 2009) (FSIA "operates as a pass-through to state-law principles" (citation omitted)).

Applying these provisions, this Court has consistently held that foreign states must be treated like private entities when they participate in the marketplace. In *Weltover*, for example, this Court held that foreign states that issue "garden variety debt instruments" payable in the United States are liable in U.S. court in the same manner as garden-variety debtors. 504 U.S. at 615. And, in *Bancec*, the Court held that a foreign state "instrumentality" that is "run as a distinct economic enterprise" is entitled to the same "presumption" of "separate legal status" as a private corporation—a presumption that can be overcome in the same circumstances that justify disregarding the separate "legal status of *private* corporations." 462 U.S. at 624-30 (emphasis in original). As this Court has explained, "[t]he fact that [a corporation's] shareholder is a foreign state does not change the analysis" of whether the corporation is separate from its parent. *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 475 (2003); *see also Bancec*, 462 U.S. at 630 ("similar equitable principles" must be applied to public and private corporations alike); *id.* at 626 ("[W]hat the Court [has] stated with respect to private corporations . is true also for governmental corporations.").[3]

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[3] The Court has applied the same rule in the context of immunity from attachment and execution. In *Republic of Argentina* v. *NML Capital, Ltd.*, the Court held that the FSIA does not "specif[y] a different rule" for post-judgment discovery

C. Holding foreign states to the same standards as private entities when they engage in commerce or other private activities makes perfect sense. As the State Department recognized when it first adopted the restrictive theory, "the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." Letter of Jack B. Tate, Acting Legal Adviser, State Department, to Philip B. Perlman, Attorney General, 26 Dep't of State Bull. 984, 985 (1952). Businesses and individuals that purchase goods and services from foreign states reasonably rely on the availability of the same judicial remedies that would be available against private parties. The FSIA thus makes available "normal legal redress against foreign states who engage in ordinary commercial activity or otherwise act as a private party." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the Comm. on the Judiciary*, 94th Cong. 24 (1976) (testimony of Monroe Leigh, Legal Adviser, State Department)).

The availability of normal legal redress is of particular concern to entities like NML that operate in capital markets or engage in other high-stakes commercial transactions with foreign states. Judicial enforcement of the legal rights of parties to financial transactions is "essential to the integrity of the capital markets." *NML Capital, Ltd.* v. *Republic of Ar-*

"when the judgment debtor is a foreign state." 134 S. Ct. at 2255.

gentina, 727 F.3d 230, 248 (2d Cir. 2013). "Experience shows that debt markets work best when the rights of creditors are protected most effectively." Andrei Shleifer, *Will the Sovereign Debt Market Survive?*, 93 Am. Econ. Rev. 85, 85 (2003). To protect domestic creditors—and credit markets—"[t]he United States has an interest in ensuring that creditors entitled to payment in the United States in United States dollars under contracts subject to the jurisdiction of U.S. courts may assume that, except under the most extraordinary circumstances, their rights will be determined in accordance with *recognized principles* of contract law." *Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-22 (2d. Cir. 1984) (emphasis added). Applying ordinary legal principles to foreign states engaged in commerce thus provides "certainty and predictability of result while generally protecting the justified expectations" of interested parties. *Bancec*, 462 U.S. at 621.

Treating foreign state enterprises like private entities benefits those state enterprises as well, because it "facilitate[s] transactions with third parties." *Bancec*, 462 U.S. at 626. While granting special treatment to foreign states "might benefit [them] in the short run, the long term effect would be to cause significant harm" to foreign states, including "developing nations," that seek to participate in U.S. markets. *Elliott Assocs. L.P.* v. *Banco de la Nacion*, 194 F.3d 363, 380 (2d Cir. 1999). If private parties in the United States cannot rely on the availability of normal legal redress against foreign states engaging in commercial activity, they may decline to conduct business with those states—particularly in U.S. capital markets or other high-stakes commercial contexts. *Ibid.* Or they may demand higher prices as

sellers, or lower prices as buyers, to compensate for uncertainty about their rights—making it more difficult for state-run enterprises to compete on equal footing with their private competitors. *Ibid.*

* * *

For all of these reasons, and consistent with the FSIA's text, history, and purpose, this Court should ensure that foreign states engaged in commercial activity in the United States are subject to the same rules as private parties.

II. Treating Foreign States Engaged In U.S. Commercial Activity In The Same Manner As Private Parties Resolves Both Questions Presented In This Case.

The rule that foreign states are treated like private parties when they conduct business in the United States resolves both questions presented in this case. *First*, foreign states conducting business in the United States are responsible for their agents' conduct in the same manner as private entities. *Second*, an action against a foreign state is "based upon" the state's act or activity within the United States under Section 1605(a)(2) (at a minimum) when that act or activity is necessary to establish an element of the plaintiff's claim, just as that relationship between a defendant, forum, and suit suffices to establish specific personal jurisdiction over a private party.

A. Foreign States Are Responsible For Their Agents' Commercial Activity Under The Same Agency Principles That Apply To Private Parties.

The rule that foreign states are treated like private parties when they conduct business in the United States has equal force when states conduct their

business through agents. Because a foreign state can act only through its agents, a state's commercial activity necessarily includes its agent's commercial acts that are attributable to the state. And under the FSIA, attribution is governed by the same common-law agency principles that apply to private parties.

1. A Foreign State's Commercial Activity Includes The Acts Of Its Agents That Are Attributable To The State.

When a foreign state does business through an agent, the agent's acts are treated as the acts of the principal under the same agency principles applicable to private parties.

a. Agency law establishes "[p]rinciples of [a]ttribution" for "attribut[ing] the legal consequences of one person's action to another person." Restatement (Third) of Agency, Ch. 2, Introductory Note. Where the requirements for attribution are satisfied, "the act of the agent is as binding upon the principal *as if it were done by the principal himself.*" *Hoffman* v. *John Hancock Mut. Life Ins. Co.*, 92 U.S. 161, 164 (1875) (emphasis added); *see also, e.g.*, *Union Mut. Ins. Co.* v. *Wilkinson*, 80 U.S. 222, 235 (1871) (companies "must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, *as if they proceeded from the principal.*" (emphasis added)); *Myrick* v. *Prime Ins. Syndicate, Inc.*, 395 F.3d 485, 491 (4th Cir. 2005) ("An agent conducting business with the authority of the principal binds the principal to the same extent *as if the principal personally made the transaction.*" (emphasis added)). Attribution in this manner ensures that a "principal

cannot escape liability" by acting "through the medium of an agent" when the same act, "if done by the principal, would have resulted in liability." 2A Corpus Juris Secundum § 410.

These same principles apply to foreign states engaged in commercial activity. A foreign state that hires an agent to carry out a business transaction "'do[es] not exercise powers peculiar to sovereigns,'" but instead merely "participat[es] in the marketplace in the manner of a private citizen or corporation." *Weltover*, 504 U.S. at 614 (quoting *Alfred Dunhill*, 425 U.S. at 704). Under the FSIA, foreign states are therefore responsible for their agents' conduct "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606.

To hold a foreign state responsible in the same manner as a private individual is necessarily to hold it responsible for the actions of its agents. "[J]ust as a corporation is an entity that can act only through its agents, '[a] State is a political corporate body [that] can act only through agents.'" *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 79 (1989) (quoting *Poindexter* v. *Greenhow*, 114 U.S. 270, 288 (1885)); *see also Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949) ("[T]he sovereign can act only through agents."). Sovereign debtors, for example, act through agents when they issue debt in U.S. capital markets and make payments on that debt. *See, e.g.*, *NML Capital, Ltd.* v. *Republic of Argentina*, 699 F.3d 246, 251 (2d Cir. 2012) (discussing debt issued "pursuant to a Fiscal Agency Agreement" between Argentina and a private bank acting as Argentina's fiscal agent); *id.* at 255 (describing Argentina's "agent-banks located in New York that hold

money in trust for bondholders and process payments to them under the terms of those bonds"). It therefore "would be absurd to say" that an act "done by [a state's] authorized agents" "was not done by [the] state." *Briscoe* v. *Bank of Commonwealth of Ky.*, 36 U.S. 257, 318 (1837). Instead, like any entity whose "ability to act derives from its own agents," a foreign state's "conduct consists of conduct by [its] agents that is attributable to it." Restatement (Third) of Agency § 7.03 (2006).

b. Consistent with these basic agency principles, the commercial-activity exception's reference to "commercial activity carried on . . by the foreign state" (28 U.S.C. § 1605(a)(2)) must include activity carried on through the state's agents and attributable to the state. "[S]tatutory terms are generally interpreted in accordance with their ordinary meaning," *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 91 (2006), and in ordinary usage a party "carrie[s] on" an activity when it acts through an agent, *see, e.g.*, *Henry L. Doherty & Co.* v. *Goodman*, 294 U.S. 623, 625 (1935) ("through agents, [principal] *carried on* the business of selling corporate securities" (emphasis added)); *Louisville & N.R. Co.* v. *Chatters*, 279 U.S. 320, 326 (1929) (principal "*carrie*[*d*] *on* [business] in [a] state, through agents of its own located there" (emphasis added)).

Moreover, this ordinary usage directly reflects the background agency principle that an agent's acts are imputed to the principal, *see supra* at 11-12, and indeed the statute is presumed to have incorporated that principle, *see Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law principles."); *see also, e.g.*, *Meyer* v. *Hol-*

ley, 537 U.S. 280, 285 (2003) (Congress "legislates against a background of ordinary . . vicarious liability rules and consequently intends its legislation to incorporate those rules.").[4]

The FSIA's legislative history confirms this interpretation. The FSIA's jurisdictional provisions—including the commercial-activity exception—were "patterned after the long-arm statute Congress enacted for the District of Columbia," H.R. Rep. No. 94-1487, at 13 (1976), which permitted D.C. courts to "exercise personal jurisdiction over a person," as to any "claim for relief arising from the person's transacting any business in the District of Columbia." Pub. L. No. 91-358, § 13-422, 84 Stat. 473, 549 (1970). The requirement that the person "transac[t] any business in the District" could be satisfied when the person "act[ed] directly or *by an agent*." *Ibid.* (emphasis added). The FSIA should be construed analogously. *See Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1176 (2014) (where Congress "modeled" one statute on another, courts should "interpre[t] the two provisions consistently" absent "overwhelming" "textual differences"). A foreign state therefore may carry on commercial activity either "directly or by an agent."

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[4] Because "commercial activity carried on . . . by the foreign state" (28 U.S.C. § 1605(a)(2)) includes activity carried on through that state's agents, it is irrelevant whether—as OBB contends—a foreign state's agent "falls within the definition of 'foreign state.'" Pet'r's Br. 44; *see also id.* at 19, 21-23, 27, 38-46, 47, 49-50, 56-57, 61. It is enough that the *principal* is a foreign state and carries on commercial activity in the United States through its agent.

c. If foreign states could not "carr[y] on" activity within the meaning of the FSIA by acting through their agents—the only way they can act—then the commercial-activity exception would have no force. A construction of the FSIA that did not permit attribution would thus run afoul of the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979). It would also undermine Congress's efforts to "codif[y]" the "restrictive theory of sovereign immunity" by limiting immunity to a foreign state's "public acts." *Verlinden*, 461 U.S. at 487-88. And it would deprive plaintiffs of the "normal legal redress" that Congress intended to confer against foreign states engaged in commercial activity. Testimony of Monroe Leigh, *supra*, 94th Cong. 24. Not only could a foreign state structure its commercial affairs to avoid all responsibility simply by choosing to act through an agent, but it could disclaim even well-settled transactions carried on in its name by its officially designated representatives or officials.

OBB concedes that the commercial-activity exception must therefore incorporate at least *some* principles of attribution. It argues that the statute's definition of "agency or instrumentality" (28 U.S.C. § 1603(b)) determines "*which* entities' activities could be *attributed* as commercial activity 'by the foreign state.'" Pet'r's Br. 40-41. It contends, in other words, that the FSIA imputes to a foreign state the acts of state entities, but not the acts of private agents.

That approach correctly recognizes that a foreign state's "commercial activity carried on in the United States" includes, in appropriate circumstances, conduct carried on through other entities—namely, the

state's agencies and instrumentalities, which are presumptively "separate juridical entities" under *Bancec*. 462 U.S. at 625. But OBB errs in insisting on a different rule for private agents. That distinction lacks any textual support. *See* Resp't's. Br. 17-22; U.S. Br. 13-15. And OBB fails to explain how state agencies and instrumentalities can carry on commercial activity as agents of their parents, if not through those agencies' and instrumentalities' *own* agents. An interpretation of the FSIA that attributes to foreign state entities only the conduct of other state entities thus fares little better than an interpretation that fails to attribute any conduct at all to a foreign state.

To give meaningful effect to the commercial-activity exception and the restrictive theory of sovereign immunity, therefore, courts must recognize that a foreign state's commercial activity includes its agent's commercial acts.

2. Common-Law Agency Principles Determine Whether An Agent's Commercial Activity Is Attributable To Its Foreign-State Principal.

The determination of *which agents* act on a foreign state's behalf—and *which acts* may be attributed to the state—is governed by common-law agency principles. To hold foreign states responsible "in the same manner and to the same extent as a private individual," as the FSIA demands, courts must apply to foreign states the same agency principles that would apply to a private party "under like circumstances." 28 U.S.C. § 1606. The FSIA thus operates as a "pass-through" to ordinary agency law. *Yugoimport*, 745 F.3d at 609 n.8.

a. This Court has already held in *Bancec* that questions of "attribution" under the FSIA are governed by "common law," not by any provision of the FSIA. 462 U.S. at 623. Just as the FSIA "was not intended to affect the substantive law determining the liability of a foreign state or instrumentality," it also "was not intended to affect . the attribution of liability among instrumentalities of a foreign state." *Bancec*, 462 U.S. at 620. The legislative history of the statute confirms that it was "not intended to affect the attribution of responsibility between or among entities of a foreign state," including "whether an entity sued is liable in whole or in part for the claimed wrong." H.R. Rep. No. 94-1487, at 12. Congress thus conceived of "attribution" as a question of "liab[ility]" to be determined under the same "substantive law of liability" applicable to private entities. *Ibid.*

Under *Bancec*, the applicable common-law principles governing attribution are derived from "federal common law," rather than "the law of the forum State." 462 U.S. at 622 n.11. Applying federal common law is appropriate, this Court explained, given "'the importance of developing a uniform body of law'" concerning the amenability of foreign states to suit in U.S. courts. *Ibid.* (quoting H.R. Rep. No. 94-1487, at 32). Federal law, in turn, reflects "the general common law of agency, rather than the law of any particular State." *Burlington Indus.* v. *Ellerth*, 524 U.S. 742, 754-55 (1998) (quotation marks omitted); *see also* Resp't's Br. 16.

OBB contends that "'pre-existing common law'" is irrelevant to FSIA immunity because the FSIA is a "'comprehensive'" statute. Pet'r's Br. 25-26. But the FSIA necessarily incorporates other substantive lia-

bility rules when immunity is intertwined with questions of liability, because the statute does not address—and was "'not intended to affect'"—"'the substantive law of liability.'" *Bancec* 462 U.S. at 620 (quoting H.R. Rep. No. 94-1487, at 12). Whether a claim is "based upon" commercial activity for purposes of jurisdiction under Section 1605(a)(2), for example, depends on the "elements of [the] claim." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 357 (1993). And those elements generally are defined by state law, not by the FSIA. *BP Chems. Ltd.* v. *Jiansu Sopo Corp.*, 285 F.3d 677, 682 (8th Cir. 2002) (applying commercial-activity exception to elements of claim under Missouri law); *Sun* v. *Taiwan*, 201 F.3d 1105, 1110 (9th Cir. 2000) (remanding for district court to apply commercial-activity exception to elements of claim under California law). Similarly, when a plaintiff alleges jurisdiction over a foreign state to seek relief "for personal injury caused by the tortious act or omission of that foreign state," 28 U.S.C. § 1605(a)(5), state tort law—not the FSIA—determines whether the foreign state's act was "tortious." *See, e.g.*, *USAA Cas. Ins. Co.* v. *Permanent Mission of the Republic of Namibia*, 681 F.3d 103, 109-11 (2d Cir. 2012) (applying New York law). The question whether a foreign state "carried on" commercial activity, too, is bound up with questions of attribution and liability, *see supra* at 13-16, and thus cannot be decided without looking to substantive agency principles located outside of the FSIA in the common law of agency.

b. Although, under *Bancec*, federal common law governs the attribution of conduct to a foreign state, it does not follow—as OBB proposes—that attribution is limited to the specific common-law principles at issue in *Bancec*. Pet'r's Br. 50-55. *Bancec* did not

involve a foreign state's actions through its agent, and thus did not address the standard for imputing to a foreign state the actions of an agent performed on the foreign state's behalf. Instead, the question in *Bancec* was whether Bancec, a state-owned bank that qualified as an "instrumentality" of the Cuban government, could be "held liable for actions *taken by the sovereign*"—namely, the expropriation of Citibank's assets—in which Bancec played no role, such that Citibank's counterclaims against Cuba could be set off against Bancec's claims against Citibank. 462 U.S. at 621.

This Court held that, under principles derived from ordinary corporate law, *see id.* at 624-30, Cuba's liability to Citibank could not be imputed to Bancec based solely on Cuba's ownership of Bancec, because Bancec was entitled to a "presumption" of "separate legal status." *Id.* at 628. This Court then held that the presumption could be overcome—and the "'corporate form disregarded'"—by showing that Bancec was "so extensively controlled by its owner that a relationship of principal and agent is created," or that recognizing the corporate form would "'work fraud or injustice.'" *Id.* at 629-30.

Both of *Bancec*'s grounds for disregarding the corporate form involve "alter-ego analysis," not agency principles. *Yugoimport*, 745 F.3d at 614. The Court relied on alter-ego principles because other grounds for attribution—such as agency principles—were plainly inapplicable: Bancec could not be held liable for Cuba's expropriation of Citibank's property under agency principles because Cuba was not Bancec's agent.

The standard for alter-ego liability is higher than the standard for agency liability because the conse-

quences are greater: Whereas agency principles attribute to the principal only specific acts within the scope of the agency relationship, *see* Restatement (Third) of Agency § 7.04, an alter-ego's conduct is imputed to another entity "for *all* purposes," U.S. Br. 17. And whereas agency liability flows from agent to principal, *see* Restatement (Third) of Agency § 7.03, alter-ego liability "can also flow in the other direction." *Alejandre* v. *Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1284 n.18 (11th Cir. 1999). Even under *Bancec*'s first test, despite the use of "principal/agent terminology," "the corporate agent may be held responsible for its owner's debts to third parties upon a showing that the owner's exercise of control constitutes an abuse of the corporate form sufficient to deprive the agent of its independent juridical identity." *Ibid.* And while this Court has held that an agent's contacts may not be imputed to its parents for purposes of general personal jurisdiction, it left in place the holding of several circuits that "a subsidiary's jurisdictional contacts can be imputed to its parent" if "the former is so dominated by the latter as to be its alter ego." *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 759 (2014).

Bancec's test addresses the requirements for triggering these significant consequences, not the lower standard for imputing a single act from agent to principal. *Bancec* thus leaves in place other common-law principles of attribution, such as agency attribution, that do not require piercing the corporate veil. The Ninth Circuit applied those principles when it held, based on the Restatement (Third) of Agency, that the sale of a ticket to Ms. Sachs through OBB's agent or subagent could be attributed to OBB. Pet. App. 18-19. Because the Ninth Circuit was correct to apply ordinary, common-law agency princi-

ples, its holding on the first question presented should be affirmed.

B. Like Private Parties, Foreign States Are Subject To Jurisdiction In U.S. Courts When Their Commercial Activity In The United States Establishes An Element Of The Plaintiff's Claim.

The rule that foreign states are treated like private parties when they carry on commercial activity in the United States also dictates the proper test for determining whether an action is "based upon" an activity or act for purposes of the FSIA's commercial-activity exception. Through the "based upon" standard, the FSIA operates as an ordinary long-arm statute that extends jurisdiction over a foreign state engaged in commercial activity in the United States, in the same circumstances that would create specific personal jurisdiction over a private party.

A private party may be subjected to specific personal jurisdiction in a given forum where the action "aris[es] out of" that party's acts in that forum. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 n.8 (1984). That test is satisfied, at a minimum, where the defendant's acts in the forum establish any element of the plaintiff's claim.

The "based upon" standard in the FSIA is modeled on the "arising out of" standard, and thus is satisfied in like circumstances. U.S. courts have jurisdiction over a claim against a foreign state, therefore, if that foreign state's commercial activity in the United States is necessary to establish any element of the claim. This "one-element test," which the Ninth Circuit applied below, better accords with the

FSIA's text and purpose, and is more easily administered, than the alternative "gravamen" tests proposed by OBB and the government.

For the reasons articulated in Ms. Sachs's brief, this Court need not decide on the proper test for determining whether an action is "based upon" an activity, because under any test, her action "is based *entirely* upon a commercial 'activity' that has substantial contact with the United States—namely, OBB's railway enterprise." Resp't's Br. 24. Should this Court address the proper "based upon" test, however, it should affirm the Ninth Circuit's one-element test.[5]

1. Foreign States Are Subject To Jurisdiction In U.S. Courts When They Engage In Commercial Activity With A Sufficient Nexus To The United States To Create Personal Jurisdiction Over A Private Party.

The commercial-activity exception's "based upon" standard is modeled on, and directly incorporates, the standard for establishing personal jurisdiction over a private party in an action "arising out of" that party's acts in the forum.

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[5] NML takes no position on the Ninth Circuit's application of the one-element test to the elements of Ms. Sachs's claims. That question is not properly before this Court because it was not raised in OBB's petition for certiorari, and because it turns on questions of state law—concerning the elements of Ms. Sachs's claims—that do not merit this Court's review. *See* Resp't's Br. 47-48; *see also* U.S. Cert. Br. 21 (noting the "case-specific nature of th[at] inquiry.").

A court may exercise personal jurisdiction over a private defendant, consistent with the requirements of due process, when that defendant is subject to either the court's general jurisdiction (because the defendant has "continuous and systematic" contacts with the forum) or its specific jurisdiction (because the action "aris[es] out of the defendant's contacts with the forum"). *Helicopteros*, 466 U.S. at 414 n.8. This Court has long recognized that exercising specific jurisdiction over a nonresident defendant to "enforce" "obligations [that] arise out of" its activities within the forum" is consistent with "'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310, 316, 319 (1945). It is therefore "sufficient for purposes of due process that [a] suit [i]s *based on* a contract which had substantial connection with that State." *McGee* v. *Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (emphasis added).

The Court has not decided whether "a foreign state is a 'person' for purposes of the Due Process Clause," *Weltover*, 504 U.S. at 619, and therefore entitled to these same due-process protections limiting the personal jurisdiction of U.S. courts. The FSIA makes that inquiry unnecessary, however, because it incorporates similar standards into its jurisdictional provisions, including the "based upon" requirement. Section 1330 provides "[p]ersonal jurisdiction over a foreign state" for "every claim for relief" "with respect to which the foreign state is not entitled to immunity" under the FSIA's exceptions to immunity (*i.e.*, Sections 1605-1607), including the commercial-activity exception. "[E]ach of th[ose] immunity provisions," in turn, "requires some connection between the lawsuit and the United States," or requires the

foreign state to consent to jurisdiction. H.R. Rep. No. 94-1487, at 13.

Together, Sections 1330 and 1605 through 1607 "provid[e], in effect, a Federal long-arm statute over foreign states" that "embodie[s]" the "requirements of minimum jurisdictional contacts." H.R. Rep. No. 94-1487, at 13. Sections 1605 through 1607 "prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction over a foreign state," Testimony of Monroe Leigh, *supra*, 94th Cong. 28, while Section 1330 creates personal jurisdiction whenever those contacts exist.

The commercial-activity exception's "based upon" requirement thus serves the same purpose as this Court's "arising out of" standard for specific personal jurisdiction: Once a foreign state sheds its immunity and places itself on the same plane as a private actor by engaging in commercial activity, *see supra* Part I, the "based upon" requirement ensures that the foreign state's commercial activity has a sufficient nexus to the United States to permit U.S. courts to exercise jurisdiction over the state.

Indeed, the FSIA's legislative history confirms that the "based upon" standard was intended to track the "arising out of" standard. In *International Shoe* and *McGee*, this Court used those phrases interchangeably to refer to the requirements for specific jurisdiction over a private party. *Compare Int'l Shoe*, 326 U.S. at 321 ("arising out of"), *with McGee*, 355 U.S. at 223 ("based on"). The FSIA and the commercial-activity exception thus "embod[y]" the "requirements of minimal jurisdictional contacts" outlined in those cases. H.R. Rep. No. 94-1487, at 13 (citing *Int'l Shoe*, 326 U.S. 310, and *McGee*, 355 U.S. at 223).

The D.C. long-arm statute on which the commercial-activity exception was "patterned" (H.R. Rep. No. 94-1487, at 13; *see also supra* at 14) adopted similar language: It permitted courts in the District of Columbia to "exercise personal jurisdiction over a person" as to a claim "*arising from* the person's transacting any business in the District of Columbia." Pub. L. No. 91-358, § 13-422, 84 Stat. 473, 549 (1970) (emphasis added). That legislative history undermines the government's assertion—without support—that the "based upon" standard adopted in the FSIA "requires a closer nexus to the United States than is required to find that a plaintiff's suit 'aris[es] out of or relate[s] to the defendant's contact with the forum.'" U.S. Br. 24 n.7 (alterations in original). Instead, "based upon" should be given the same meaning as the phrase "arising out of," from which it was derived.

2. Private Parties Are Subject To Jurisdiction In The United States When Their Acts In The United States Are Necessary To Prove An Element Of The Plaintiff's Claim.

A claim "arises out of" a defendant's contact with a forum, at a minimum, when its acts in the forum establish an element of the plaintiff's claim. This Court has not articulated the precise "tie between a cause of action and a defendant's contacts with a forum" necessary to establish specific jurisdiction. *Helicopteros*, 466 U.S. at 415 n.10. But the lower courts have distinguished three dominant approaches. *See, e.g.*, *Myers* v. *Casino Queen, Inc.*, 689 F.3d 904, 912 (8th Cir. 2012).

"The most restrictive standard is the 'proximate cause' or 'substantive relevance' test," which "examines whether any of the defendant's contacts with the forum are relevant to the merits of the plaintiff's claim." *O'Connor* v. *Sandy Lane Hotel Co.*, 496 F.3d 312, 318-19 (3d Cir. 2007). The "more relaxed" "but for" test requires that "the plaintiff's claim would not have arisen in the absence of the defendant's contacts." *Myers*, 689 F.3d at 912 (quotation marks omitted). And the "substantial connection" or "discernible relationship" test examines "whether the tie between the defendant's contacts and the plaintiff's claim is close enough to make jurisdiction fair and reasonable." *O'Connor*, 496 F.3d at 319 (quotation marks omitted).

Regardless of which test controls, specific jurisdiction exists under each of them when the defendant's activity in the forum establishes a necessary element of the plaintiff's claim.

The "proximate cause" or "substantive relevance" test requires activities that are "relevant to the merits of the plaintiff's claims," *O'Connor*, 496 F.3d at 318-19 (quotation marks omitted), so a court may hear any action in which the defendant's contacts form a "material" "element of proof in the plaintiff's case," *Nowak* v. *Tak How Invs., Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996) (quotation marks omitted). In a contract action, for example, it is sufficient under this test that "'the defendant's contacts with the forum were instrumental in *either the formation* of the contract *or its breach*.'" *O'Connor*, 496 F.3d at 320 (emphases added).

Likewise, under the "but-for" causation test, a defendant's contact with the forum that is *necessary* to the plaintiff's claim is necessarily a fact without

which "the . . . claim would not have arisen." *Myers*, 689 F.3d at 912 (quotation marks omitted).

Finally, under the "substantial connection" test, it is sufficient that the "operative facts of the controversy are . . . related to the defendant's contact with the state." *Third Nat'l Bank in Nashville* v. *WEDGE Grp., Inc.*, 882 F.2d 1087, 1091 (6th Cir. 1989) (quotation marks omitted). That "lenient standard," *Bird* v. *Parsons*, 289 F.3d 865, 875 (6th Cir. 2002), merely *relaxes* the requisite degree of connection—below that required under the proximate or but-for causation test—where a defendant has especially substantial contacts with the forum. *O'Connor*, 496 F.3d at 320. Courts applying that test therefore readily find jurisdiction appropriate where the defendant's contact with the forum is necessary to establish an element of the plaintiff's claim. *See, e.g., Air Prods. & Controls, Inc.* v. *Safetech Int'l, Inc.*, 503 F.3d 544, 553 (6th Cir. 2007) (test satisfied because "[o]ne element of [plaintiff's] cause of action for fraudulent transfer is that there be a debtor-creditor relationship which was made possible by and would not have existed but for" defendant's business relationship in the forum state); *Tharo Sys., Inc.* v. *Cab Produkttechnik GMBH & Co. KG*, 196 F. App'x 366, 371 (6th Cir. 2006) (where defendant's forum contacts are "substantially connected with" "the operative facts regarding the formation and meaning" of a contract, "it matters not that the actual breach may have occurred" elsewhere).

Thus, even under the "most restrictive" standard, *O'Connor*, 496 F.3d at 318, an act that establishes an element of the plaintiff's claim satisfies the "arising out of" standard. Meeting the one-element test accordingly suffices to establish specific jurisdiction.

OBB's contention that the Ninth Circuit's holding below makes it "easier for a plaintiff to obtain jurisdiction in the courts of the United States over a foreign state than a foreign corporation" (Pet'r's Br. 63 (emphases omitted)) is therefore unfounded. All of the approaches that lower courts apply to test specific jurisdiction over private parties, including foreign corporations, would be satisfied by the one-element test that the Ninth Circuit applied here. And under that test, a private defendant would be subject to specific jurisdiction on the facts of this case: an action alleging that the defendant's sale of goods or services in the forum, through the defendant's agent, gave rise to a duty that the defendant later breached. *See, e.g.*, *O'Connor*, 496 F.3d at 323-24 (finding personal jurisdiction over tort claim alleging that defendant breached a duty that arose as a result of its sale of services in the forum state, even though breach occurred outside the forum); *Pro Axess, Inc.* v. *Orlux Distrib., Inc.*, 428 F.3d 1270, 1278-79 (10th Cir. 2005) (contract claim arose out of French company's actions, largely through an agent, to solicit and develop business agreement with, and communicate with, in-forum plaintiff); *Mott* v. *Schelling & Co.*, 966 F.2d 1453 (6th Cir. 1992) (per curiam) (unpublished) (product liability action against Austrian defendant arose out of defendant's sales, through an agent, into the forum); *cf. Daimler AG*, 134 S. Ct. at 759 n.13 (for purposes of specific jurisdiction, "a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there"). The Ninth Circuit's

one-element test is thus fully consistent with the rule applicable to private parties.[6]

3. The One-Element Test Better Accords With The FSIA's Text And This Court's Decision In *Nelson*, And Is More Easily Administered, Than The "Gravamen" Tests Proposed By OBB And The United States.

Because the FSIA treats foreign states engaged in commercial activity "in the same manner as a private individual under like circumstances," 28 U.S.C. § 1606, the same one-element test that suffices to establish personal jurisdiction over a private defendant also applies to foreign states under the commercial-activity exception. The one-element test better accords with the FSIA's text, this Court's decision in *Nelson*, and the overwhelming weight of au-

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[6] OBB suggests that *Helicopteros* and *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 131 S. Ct. 2780 (2011), show that a private party in OBB's shoes could avoid specific jurisdiction in like circumstances, but neither case supports that tion. Pet'r's Br. 63. In *Helicopteros*, this Court analyzed only *general jurisdiction*; the parties "concede[d]" that the plaintiff's claims "did not 'arise out of'" the defendant's activities in the forum, and did not "argu[e] any relationship between the cause of action" and the "forum." 466 U.S. at 415-16 & n.10. This Court accordingly "assert[ed] no 'view' with respect to that issue." *Id.* at 415 n.10. And in *Nicastro*, personal jurisdiction was absent because the defendant did not "engage in *any* activities" in the forum, but instead merely placed products into the "'stream-of-commerce,'" leading to their sale in the forum by an "independent company"—not an agent of the defendant. 131 S. Ct. at 2785-86, 2791 (plurality op.) (emphasis added).

thority in the courts of appeals than the alternative approaches that OBB and the government propose. It is also far more easily administered, and thus better serves the FSIA's purpose of "clarify[ing] the governing standards" for foreign sovereign immunity. *Verlinden*, 461 U.S. at 488.

OBB and the government contend that, to satisfy the "based upon" standard under *Nelson*, a foreign state's commercial activity must constitute "the gravamen of [the plaintiff's] claims." U.S. Br. 9; *see also* Pet'r's Br. 29 ("the focus should be on the gravamen of the complaint" (quotation marks omitted)). The government defines the "gravamen" as the "gist or essence of [the] claim," U.S. Br. 21, while OBB specifies that, "in the context of claims for personal injuries," the "gravamen" is "the alleged tortious conduct that injured the plaintiff." Pet'r's Br. 29. Those tests are unsupported, and instead the one-element test is correct.

As an initial matter, as demonstrated in Ms. Sachs's brief, the one-element test is more consistent with dictionary definitions and other statutory uses of the phrase "based upon" than the "gravamen" tests that OBB and the government propose. *See* Resp't's Br. 39-40.

Moreover, as Ms. Sachs has also articulated, *Nelson* did not adopt the gravamen test, and indeed endorsed caselaw applying the one-element test. *Nelson*, 507 U.S. at 357 (citing *Santos* v. *Compagnie Nationale Air Fr.*, 934 F.2d 890, 893 (7th Cir. 1991)); *see also* Resp't's Br. 37-39. OBB and the government contend that *Nelson* adopted or approved the gravamen test when it quoted, in a parenthetical, the Fifth Circuit's statement in *Callejo* v. *Bancomer* that the "focus" of the "based upon" inquiry "should be on the

'gravamen of the complaint.'" *Nelson*, 507 U.S. at 357 (quoting *Callejo*, 764 F.2d 1101, 1109 (5th Cir. 1985)); *see also* Pet'r's Br. 28-29; U.S. Br. 19-21. But that argument misconstrues both *Callejo* and *Nelson*'s citation to it.

Callejo used the phrase "gravamen of the *complaint*"—rather than "gravamen of [the] *claim*," U.S. Br. 9 (emphasis added)—to distinguish allegations establishing "elements of the cause of action itself," from those serving merely as background. 764 F.2d at 1109. The Fifth Circuit thus held that the plaintiff's claim was "based upon" the defendant's breach of contract, rather than upon other allegations about what *caused* the defendant to breach the contract. *Ibid.* This Court reached the same conclusion in *Nelson*: It held that the plaintiff's action was not "based upon" allegations about events that merely "*led to* the conduct that eventually injured the plaintiff." 507 U.S. at 358. *Callejo*'s and *Nelson*'s use of the word "gravamen" thus reflects nothing more than the requirement that courts focus on allegations related to "elements of [the] claim," rather than other allegations in the complaint. *Id.* at 357. The Fifth Circuit has accordingly reaffirmed, after *Nelson*, that the "based upon" standard requires only that the foreign state's "act or activity form the basis of *at least some element of the cause of action*." *Voest-Alpine Trading USA Corp.* v. *Bank of China*, 142 F.3d 887, 892 (5th Cir. 1998) (emphasis added). Other courts of appeals have likewise understood *Nelson* to approve the one-element test. *See* Resp't's Br. 37.

The one-element interpretation is also far more easily administered than any "gravamen" approach proposed by OBB or the government. As Ms. Sachs

explains, Resp't's. Br. 40-43, "administrative simplicity is a major virtue in a jurisdictional statute," and "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case," *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

The one-element test offers courts a straightforward method to assess jurisdiction. *See* Resp't's Br. 46. Indeed, it requires courts only to determine what they already must determine in ruling on a motion to dismiss: which factual allegations are necessary to establish the plaintiff's claims. *Cf., e.g., Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 561 (2007).

A "gravamen" test, in contrast, would require a "freewheeling judicial inquiry" (*Chamber of Commerce* v. *Whiting*, 131 S. Ct. 1968, 1985 (2011) (quotation marks omitted)) into what constitutes the "gist or essence of a claim." U.S. Br. 21. Ms. Sachs explains several of the hazards such an unguided approach presents. *See* Resp't's Br. 43-46. Among other things, the "gravamen" approach would force courts routinely to undertake not just the relatively simple task of identifying the elements of a particular claim under the governing law, but also (somehow) a complicated and subjective inquiry into their relative importance. And that is just to determine whether the court has *jurisdiction* to hear the claim at all.

Predictability and consistency are critical for private parties like NML who deal with foreign states or are affected by those states' commercial activities. Sophisticated parties, in particular, routinely negotiate and enter into high-stakes commercial agreements with foreign states. "Predictability is valuable to corporations making business and investment de-

cisions." *Hertz*, 559 U.S. at 94. Uncertainty whether disputes can be resolved in U.S. courts discourages parties from transacting with foreign states and generates wasteful litigation, "eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Ibid.*

The gravamen test should therefore be rejected. Only the Ninth Circuit's one-element test fulfills the FSIA's text, history, and purpose by subjecting foreign states engaged in commercial activity to the same standard as private parties, and it does so in an easily understood and administered way.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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